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GREEN ROOTS, BAD PRUNING: GATT RULES AND THEIR APPLICATION TO ENVIRONMENTAL TRADE MEASURES

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Over the past few years, the issue of "trade and the environment" has emerged as one of the so-called new issues of international trade policy.[1] Of course, the issue is not really new, and there was much excellent work done on the subject in the early

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1. GEZA FEKETEKUTY, THE NEW TRADE AGENDA 7-9, 18-19 (1992). *See also* Lionel Barber, *Environment Is Top of Clinton's Trade Agenda*, FIN. TIMES, Jan. 12, 1994, at 14.

1970s.[2] But for reasons not entirely clear, the issue disappeared from the public policy radar screen for nearly twenty years.[3]

Without doubt, the issue is back. The environment was a key topic in the negotiations for the North American Free Trade Agreement (NAFTA).[4] While the environment was not a central issue for the Uruguay Round of multilateral trade negotiations,[5] the General Agreement on Tariffs and Trade (GATT)[6] is now attempting to write a work plan about the environment to begin when the Round is signed in April 1994.[7] When the U.S. Congress considers the new agreement later this year, it is sure to debate the environmental aspects of the document.[8]

Furthermore, just as trade institutions have begun to focus on the environment, environmental institutions have begun to focus on trade. For example, the U.S. Environmental Protection Agency created three advisory groups in 1991 to consider trade issues.[9] Similarly, the parties of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)[10] look

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2. *See, e.g.,* Williams Commission, UNITED STATES ECONOMIC POLICY IN AN INTERDEPENDENT WORLD (1971) at 777-79. *See also* Charles S. Pearson, *The Trade and Environment Nexus: What is New Since '72*, *in* TRADE AND THE ENVIRONMENT: LAW, ECONOMICS, AND POLICY (Durwood Zaelke et al. eds., 1993).

3. One exception is the excellent book on the subject that came out in the middle of the interregnum. *See* ENVIRONMENT AND TRADE: THE RELATION OF INTERNATIONAL TRADE AND ENVIRONMENTAL POLICY (Seymour J. Rubin & Thomas R. Graham eds., 1982).

4. North American Free Trade Agreement, Dec. 11, 1993, 32 I.L.M. 605 [hereinafter NAFTA].

5. *See* Office of the United States Trade Representative, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Dec. 15, 1993 [hereinafter Uruguay Round Agreement].

6. GATT is the name of both the international agreement and the organization that administers it. Many commentators have suggested that the GATT governs trade. *See, e.g., A Guide to GATT*, N.Y. TIMES, Dec. 1, 1993, at D2. But that is not true. The GATT governs only trade restrictions. The text of the GATT agreement can be found in GATT *Text of the General Agreement*, IV BASIC INSTRUMENTS AND SELECTED DOCUMENTS 1 (1969) [hereinafter GATT].

7. Bob Davis, *U.S. Is Hoping to Blend Environmental, World Trade Issues at Morocco Meeting*, WALL ST. J., Jan. 10, 1994, at A10.

8. *See Will a Mad Rush to a False Deadline Lead to a GATT Failure in Congress?*, FIN. TIMES, Dec. 9, 1993, at 5.

9. *See* TRADE AND ENVIRONMENT COMMITTEE OF THE NATIONAL ADVISORY COUNCIL FOR ENVIRONMENTAL POLICY AND TECHNOLOGY, THE GREENING OF WORLD TRADE: A REPORT TO THE ENVIRONMENTAL PROTECTION AGENCY, EPA 100-R-93-002 (Feb. 1993).

10. Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 12 I.L.M. 1085 [hereinafter CITES].

increasingly to the use of trade measures to enforce the treaty commitments.[11] Additionally, the U.N. Conference on the Environment and Development attempted to consider both trade and environment issues under the rubric of "sustainable development."[12] Both the United Nations Environment Program (UNEP) and the International Union for the Conservation of Nature (IUCN) are examining trade-environment interactions.

The infamous dolphin-tuna dispute of the early 1990s crystallized for the public the implications for the environment of trade agreements.[13] The case involved the U.S. Marine Mammal Protection Act (MMPA).[14] Congress initially enacted this law in 1972. Congress then amended the MMPA in 1988 to clearly delineate the requirements for U.S. government bans on the importation of tuna caught by countries whose fishing practices have high dolphin mortalities.[15] The Bush Administration tried to avoid imposing the required import bans, but the Earth Island Institute, a California-based environmental group, won a federal court judgment to mandate tuna embargoes.[16] In response to the ensuing U.S. embargoes against its tuna, Mexico lodged a complaint in the GATT asserting that the embargo violated GATT obligations.[17]

In September 1991, the GATT panel ruled that the U.S. embargo violated GATT.[18] But in winning the battle, Mexico

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11. Steve Charnovitz, *A Taxonomy of Environmental Trade Measures*, 6 GEO. INT'L ENVTL. L. REV. 1, 25-29 (1993).

12. *See United Nations Conference on Environment and Development,* Agenda 21, at paras. 2.22, 11.24, 39.3, U.N. Doc. A/Conf. 151/4 (1992).

13. *See generally* Eric Christensen & Samantha Geffin, *GATT Sets Its Net on Environmental Regulation: The GATT Panel Ruling on Mexican Yellowfin Tuna Imports and the Need for Reform of the International Trading System*, 23 U. MIAMI INTER-AM. L. REV. 569 (1992).

14. 16 U.S.C. §§ 1371-1407 (1993).

15. Marine Mammal Protection Act, Amendments of 1988, Pub. L. 100-711, 102 Stat. 4755 (1988) (current version at 16 U.S.C. § 1371 (1988 and Supp. 1992)) [hereinafter MMPA].

16. Earth Island Inst. v. Mosbacher, 929 F.2d 1449, 1452 (9th Cir. 1991).

17. *See* Ted L. McDorman, *The 1991 U.S.-Mexico GATT Panel Report on Tuna and Dolphin: Implications for Trade and Environment Conflicts*, 17 N.C. J. INT'L L. & COM. REG. 461, 461-66 (1992).

18. *GATT: Dispute Settlement Panel Report on U.S. Restrictions on Imports of Tuna*, GATT BISD 395/155, 30 I.L.M. 1594 (1991) [hereinafter *Dolphin Report*]. This report has not been adopted by the GATT council. Since there was already a U.S. tuna case in 1982 (which was unrelated to dolphin safety), this more recent case should be distinguished, and will be referred to as the "Dolphin" report or decision.

fomented a new war. The decision startled American environmental organizations, making them deeply concerned when they realized that the panel's logic could be applied to invalidate numerous other environmental laws.[19] These groups began to take the GATT seriously and assigned staff to work full-time on the trade and environment linkage. Once it became clear how troublesome the GATT panel's decision was, the Bush Administration convinced Mexico not to seek adoption[20] of the panel report within the GATT.[21] Since Mexico's top international economic priority was the negotiation of NAFTA, Mexico was willing to suspend its GATT complaint in the interest of securing environmentalist support for NAFTA.[22]

While this case remains in abeyance, another GATT panel is considering the same issue on a complaint brought by the European Union (EU). The EU has also filed a complaint against two other U.S. environmental laws: the corporate average fuel economy (CAFE) penalties, and the gas guzzler tax for automobiles.[23] The GATT panels may issue reports on these cases at any time, and these reports may provoke new controversy.

This fundamental question of sovereignty underlies the trade and environment debate: should countries be able to set the domestic environmental standards they desire, or are international organizations needed to review such standards when they impact international trade? In considering whether nations should give up some of their environmental sovereignty in the interest of promoting the world trade system, one must start by analyzing the operation of current GATT rules. The purpose of this article is to address the question of how GATT rules hinder national environmental trade measures (ETMs).

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19. Charles Arden-Clarke, *The Cruel Trade-off*, GUARDIAN (London), Sept. 13, 1991 (claiming that the GATT ruling confirms the worst fears of the NGO community).

20. GATT panels are not courts. Their reports are only recommendations to the contracting parties of GATT. Until adopted by the GATT council, they have no real legal status under GATT.

21. *See Mexico Opts to Forsake GATT for Bilateral Resolution of Tuna Dispute*, INSIDE U.S. TRADE, Sept. 27, 1993, at 1.

22. As a result of Mexico's inaction, the Dolphin decision was not adopted by the GATT Council. Although it has no precedential force in its present form, the decision will be discussed here because it crystallizes many of the key issues regarding GATT.

23. *See* Commission of the European Communities, REPORT ON U.S. BARRIERS TO TRADE AND INVESTMENT, 1993, at 19-20, 51-53.

There are two types of national laws which are ETMs: those which apply to both imported and domestic products, and those which apply exclusively to imports. In this article, the former type of ETM will be called a "standard" and the latter will be called a "ban." As used in this paper, the term "environment" will cover a broad array of issues including species protection, pollution control, natural resource conservation, public health, atmospheric stability, food safety, epizootics and ecosystem sustainability.

Sections I through IV consider four common types of ETMs: product standards, process standards, import bans, and export bans.[24] Each section will offer some examples of that particular type of ETM and then discuss the GATT implications.[25] Specifically, each section will first analyze the applicable GATT prohibitions on trade restrictions. Following this analysis, each section will also address the applicability of GATT Article XX to the particular trade measure. If Article XX applies, it could qualify the ETM in question within an exception to GATT prohibitions. Section V will return to the fundamental issue of whether GATT rules should interfere with national sovereignty.

I. PRODUCT STANDARDS

Product standards are qualitative and quantitative benchmarks. They relate to factors such as purity (for example, in meat), safety in use (for example, in cocaine), or pollution emitted (such as catalytic converters). Such standards are applied to both domestic products and imported products. For an early example of a product standard, in 1866 Congress banned the transportation of nitroglycerine.[26] Another example is the 1914 Congressional ban on the landing or sale of sponges from the Gulf of Mexico which were less than five inches in diameter.[27] This 1914 sponge law is noteworthy because it is an early use of an ETM to protect a resource in the global commons.

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24. This article does not cover other types of ETMs such as internal taxes, tariffs, sanctions, conditionalities or subsidies.

25. For further examples of environmental trade measures, see Charnovitz, *supra* note 11, at 3-6.

26. 14 Stat. 81 (1866) (repealed).

27. 38 Stat. 692 (1914) (current version at 16 U.S.C. § 781 (1988)). While the statute itself is ambiguous as to whether it applies to foreign fishermen, the legislative history clearly indicates that it does. *See* 51 CONG. REC. 13,196 (1914).

It is important to recognize that product standards focus on consumption of the object itself. A product standard must be differentiated from another type of environmental standard, known as a *process standard.* Process standards, which will be discussed later in this paper,[28] focus on production rather than on consumption.[29] The concern of process standards is usually not whether the widget itself is healthy to use, but whether the process of manufacturing the widget is safe. It is not always easy to distinguish between these two controls because much depends on how a law is written. The distinction, however, can be important for GATT purposes.

Product standards can be divided into two types: design and performance. Design standards relate to the physical characteristics of a product or how it is constructed. A ban on the sale of automobiles without "Unleaded Fuel Only" gasoline inlets is a design standard.[30] Another example is the European Community directive of 1973 which prohibited the sale of detergents with a biodegradability of less than 90%.[31]

On the other hand, performance standards relate to how well a product works or how it complies with specific operational tests. Performance standards are now being utilized for radioactivity, pollution emissions, noise, and toxic residues.[32] Many countries are considering standards for ergonomics and disposability, including both biodegradability and recyclability.[33]

When the United States applies product standards to foreign-made goods, the standard may prevent the import from entering the country. This article will not consider such exclusions to be an import ban so long as the standard being applied to imports is the

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28. Process standards do relate to consumption in some cases—most frequently in the area of food or drug safety. For example, under the Import Milk Act of 1927, ch. 155, § 244, 44 Stat. 1101, *repealed by* 21 U.S.C. § 142 (1972), milk or cream cannot be imported unless a series of requirements on the cattle are met, including a physical exam and a tuberculin test within the past year.

29. Process standards will be discussed in Part II, *infra*.

30. The U.S. standard on unleaded fuel inlets can be found at 42 U.S.C. § 7522(a)(1) (Supp. 1992) and 40 C.F.R. § 80.24(b) (1992).

31. Council Directive 73/404, art. 2, 1973 O.J. (L 347) 51.

32. *See* "Implications for the Trade and Investment of Developing Countries of United States Environmental Controls," UNCTAD Doc. TD/B/C.2/150/Add.1/Rev.1, 1976, at 79-105 (examining U.S. environment-related product standards). This study is dated, but no more recent study exists.

33. *See Free Trade's Green Hurdle*, ECONOMIST, June 15, 1991, at 61-62.

same as the standard being applied to domestic products. We will now turn to the impact of GATT rules on product standards.[34]

A. GATT Article III

The GATT applies a discipline to product standards known as "national treatment." Under GATT Article III:4, imported products must be

> accorded treatment no less favorable than that accorded to like domestic products of national origin in respect of all laws, regulations, and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution, or use.[35]

The application of national treatment is best illustrated by example. Consider a pesticide tolerance level for wine. If Country A rejects wine from Country B on the grounds that too much pesticide is present, Country B might complain that the presence of pesticide is not a valid reason for treating its products less favorably than wine without pesticides. Few analysts would support this extreme position.[36] Instead, the conventional view is that very detailed product-based distinctions, such as pesticide-presence, would be permissible under Article III:4 so long as the same rules are applied to imports as to domestic products.

Consider the U.S. law prohibiting interstate and foreign commerce in lobsters smaller than the minimum size established under the American Lobster Fishery Management Plan.[37] If faced with a complaint, the GATT would ask whether small lobsters are a "like" product to large lobsters.[38] If they are not "like" products, then the law would survive GATT scrutiny. If they are "like" products, however, then the GATT could consider whether the exporter of

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34. The GATT also contains a transparency requirement that any "new or more burdensome requirement, restriction or prohibition on imports" be published before being applied. GATT, *supra* note 6, art. X:2.

35. GATT, *supra* note 6, art. III:4.

36. If a country is permitted under Article III to prohibit all foreign and domestic wine, then it should also be able to restrict all foreign and domestic wine with pesticides.

37. 16 U.S.C. § 1857(1)(J) (1992).

38. "Likeness" is not defined in the GATT. It has been taken to be broader than "identical," but narrower than "competing" or "substitutable." *See EEC—Measures on Animal Feed Proteins*, GATT BISD 25S/49, at para. 4.20 (Mar. 14, 1978).

small lobsters is being treated less favorably than the American lobster producer. If the exporter was being treated less favorably, the U.S. law would be a violation of Article III:4.

Another example is a product standard for newsprint mandating that it contain a certain percentage of recycled fiber.[39] One begins by determining whether recycled newsprint is a "like" product to virgin newsprint. If so, then a regulation keeping out virgin newsprint from Country A while permitting the sale of recycled newsprint produced domestically could be viewed as a violation of GATT Article III:4.

The difficulty is that the GATT contains no criteria for determining when two products are "like" and when they are not.[40] Drafters of the agreement considered the issue in 1946-47, but determined that there was no way to devise hard and fast rules.[41] Instead, decisions were to be made on a case-by-case basis. The GATT case law on "like" products so far has not been uniform. For example, the Japan Customs Duties Panel found wines with high and low raw material contents to be "like" products.[42] But the U.S. Beer Report Panel found that liquors with high and low alcohol contents were not "like" products.[43]

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39. This might also be viewed as a process standard. *See* J. Christopher Thomas, *The Future: The Impact of Environmental Regulations on Trade*, 18 CAN.-U.S. L.J. 383, 389-92 (1992) (discussing recycled newsprint standards).

40. *See Recommendations of the Economic Committee Relating to Tariff Policy and the Most-Favoured-Nation Clause*, League of Nations Doc. E.805 (1933) at 18-19 (discussing the definition of "like," and noting some product stipulations clearly incompatible with MFN treatment). *See also* LONDON DRAFT: PROPOSED CHARTER FOR THE INTERNATIONAL TRADE ORGANIZATION (ITO), U.N. Doc. E/PC/T/186, ch. III, § A (1946) (noting that the MFN clause in the ITO Charter was based on the standard MFN clause developed by the League of Nations). References to the preparatory history of the GATT refer to the deliberations of the U.N. Conference on International Trade and Employment and its preparatory meetings, which led to the GATT and the ITO Charter.

41. *See* JOHN H. JACKSON, WORLD TRADE AND THE LAW OF GATT 259-64 (1969) (discussing the term "like" at the ITO Conference). For a critique of the use of the ITO conferences to interpret the GATT, see John H. Jackson, *World Trade Rules and Environmental Policies: Congruence or Conflict*, 49 WASH. & LEE L. REV. 1227, 1242 (1992) (criticizing the heavy reliance on original GATT drafting history to explicate GATT).

42. *Japan: Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages*, GATT BISD 34S/83, at para. 5.9(d) (Nov. 1987).

43. *United States: Measures Affecting Alcoholic and Malt Beverages*, GATT BISD 39S/206, at para. 5.75 (June 19, 1992) [hereinafter *U.S. Beer Report*].

Some commentators have suggested that in addition to, or perhaps instead of,[44] coverage under Article III, any standard which prevents the entry of imported products is an import ban[45] which comes under the discipline of GATT Article XI.[46] The GATT is not clear on this issue,[47] but recent dispute panels have taken the position that import[48] measures will be reviewed under Article III or Article XI, but not both.[49] It is interesting to note that Article XI:2b contains an ambiguous exclusion for "import and export prohibitions or restrictions necessary to the application of standards or regulations for the classification, grading or marketing of commodities in international trade."[50] This could suggest that Article XI leaves standards to Article III, or that Article XI covers certain import prohibitions, but excludes those relating to classification, grading or marketing of commodities.

It should also be noted that the GATT is no more tolerant of multilateral product standards than it is of unilateral environmental standards.[51] The same discipline applies to both.[52] If a nation imposes a product standard pursuant to an international agreement,

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44. Several panels have suggested that Article III applies to "imported products" while Article XI applies to the measures affecting the "importation" of products. *See Italian Discrimination Against Imported Agricultural Machinery*, GATT BISD 7S/60, at para. 11 (Oct. 1958); *Canada: Administration of the Foreign Investment Review Act*, GATT BISD 30S/140, at para. 5.14 (Feb. 1984). Under this distinction, a ban preventing a product from being imported is a matter under Article XI.

45. *See* discussion *infra* Part III-IMPORT BANS.

46. *See Lobsters from Canada*, at paras. 8.12-8.59 (unpublished GATT opinion, on file with U.S.-Canada Free Trade Agreement Secretariat (Washington, D.C.)). Viewed in this way, GATT Ad Article III clarifies the national treatment obligation. It does not relieve a contracting party of its Article XI obligations. GATT, *supra* note 6, Ad art. III.

47. GATT Ad Article III, para. 1, is cited as showing that internal standards enforced at the border are not regulated by Article XI. GATT, *supra* note 6, Ad art. III. But, this paragraph says nothing about Article XI. There would be a much stronger case if this were an Ad paragraph to Article XI.

48. Export measures continue to be reviewed under Article XI. GATT, *supra* note 6, art. XI, at 17-18.

49. *See, e.g., Canada: Administration of the Foreign Investment Review Act*, GATT BISD 30S/140, at para. 5.14 (Feb. 1984); *United States: Section 337 of the Tariff Act of 1930*, GATT BISD 36S/345, at para. 5.10 (Nov. 1989); and *Canada: Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies*, GATT BISD 39S/27, at para. 5.28 (1992).

50. GATT, *supra* note 6, art. XI(2)(b).

51. *See infra* notes 62-66 and accompanying text (discussing the new Uruguay Round agreement).

52. GATT, *supra* note 6, art. III.

however, this measure may violate the GATT if the international agreement is viewed as superseding the GATT under the "later in time" rule of international law.

B. The Standards Code

Although these Article III disciplines have always been in place, they have rarely been invoked against product standards. But by the late 1960s, it was recognized that differences in national standards continued to be serious barriers to trade. Moreover, it was feared that these differences would loom larger as tariffs came down. During the Tokyo trade round in the mid-1970s, this problem was discussed extensively and a new Standards Code was adopted.[53]

Four elements of the Standards Code are important to note.[54] First, the Code directs parties to ensure that neither technical regulations nor standards are "applied with a view to [or with] the effect of creating unnecessary obstacles to international trade."[55] Second, the Code directs parties to use relevant international standards except where such standards "are inappropriate for the Parties concerned."[56] Third, the Code lists several reasons why international standards might be inappropriate including "protection for human health or safety, animal or plant life or health, or the environment."[57] Fourth, the Code directs parties to use performance rather than design standards.[58]

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53. *Agreement on Technical Barriers to Trade*, GATT BISD 26S/8 (1979) [hereinafter *TBT Agreement*]. Because of the difficulty of amending GATT, a separate code was devised to achieve greater discipline among subscribing parties. It is called a code because it is only binding on those who sign it. No violation of MFN treatment occurs when countries agree among themselves to follow tougher rules than GATT imposes (*i.e.*, permitting fewer trade restrictions). *See* R.W. Middleton, *The GATT Standards Code*, 14 J. WORLD TRADE L. 201 (1980) (discussing the Standards Code).

54. Despite its informal name, the Standards Code does not specify product standards that have to be met for an item to be circulated in trade. Rather, it establishes rules for the application of domestic standards to imports.

55. *TBT Agreement*, *supra* note 53, art. 2.1.

56. *Id*. art. 2.2.

57. *Id*. Thus, the Code goes beyond the *explicit* language of GATT Article XX in two areas: human safety and the protection of the environment.

58. *Id*. art. 2.4. Performance standards are viewed as potentially less restrictive than design standards because performance standards give exporting nations more flexibility in engineering a solution.

Because the Standards Code exempts environmental product standards from the requirement to use international standards,[59] the main way in which the Code provided more discipline than the GATT was in the stipulation that standards should not create "unnecessary obstacles" to trade.[60] Since it offered no definition for the term "unnecessary," however, the Code had little impact on environmental product standards.[61]

At the Uruguay Round, the parties wrote a new agreement on Standards. These changes would, for the first time, impose substantial limitations on environmental product standards.[62] The new Agreement on Technical Barriers to Trade (TBT Agreement) defines "unnecessary obstacles" to trade as standards that are "more trade-restrictive than necessary to fulfill a legitimate objective, taking account of the risks non-fulfillment would create."[63] The TBT Agreement lists protection of the environment as one legitimate objective. In addition to tightening the Standards Code, the Uruguay Round negotiators have also drafted an Agreement on Sanitary and Phytosanitary Measures that would impose new limitations on certain health measures.[64] Health measures that conform to international standards, however, would be presumed to meet the obligations under both the GATT and the Sanitary and Phytosanitary Agreement.[65] The trade-restrictiveness test, if implemented, would open a new front of GATT surveillance.[66]

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59. *Id*. art. 2.2.

60. *See* Steven J. Rothberg, Note, *From Beer to BST: Circumventing the GATT Standard Code's Prohibition on Unnecessary Obstacles to Trade*, 75 MINN. L. REV. 505, 530 (1990).

61. *See* SENATE FIN. COMM., 96th Cong., 1st Sess., ANALYSIS OF NONTARIFF AGREEMENT MTN STUDIES 6, 69 (Comm. Print 1979) (discussing the matter of definition).

62. For a good discussion of the scientific issues surrounding the new codes, see U.S. CONG., OFF. OF TECH. ASSESSMENT, TRADE AND ENVIRONMENT: CONFLICTS AND OPPORTUNITIES, 102d Cong., Background paper OTA-BP-ITE-94 at 61-64 [hereinafter OTA TRADE AND ENVIRONMENT REPORT].

63. *TBT Agreement*, *supra* note 53, art. 2.2.

64. Uruguay Round Agreement, *supra* note 5, Part II, Annex 1A, sec. 4.

65. *Id*. para. 10.

66. This test is commonly called the "least trade restrictive test" even though the Agreement does not use that phraseology exactly. The Agreement states that "technical regulations shall not be maintained if the circumstances or objectives giving rise to their adoption no longer exist or if changed circumstances or objectives can be addressed in a less trade-restrictive manner." *See TBT Agreement*, *supra* note 53, art. 2.3. In other words, there is a continuing obligation to choose alternatives when they can address the objective in a less

While there is no reason that GATT interpretations should follow case law of other agreements, a rule similar to the "least trade restrictive rule" has evolved in the jurisprudence of the European Community (EC).[67] The European Court of Justice in 1988 held that a Danish law setting a limit on the amount of beer that could be sold in containers not approved for recycling was "disproportionate" to the environmental objective pursued.[68] Because it is an economic union with political institutions and greater accountability, the EC may find this rule appropriate. It may, however, be very inappropriate for an international organization like GATT.

C. GATT Article XX

Recognizing that the Article III discipline can interfere with health measures, the GATT provides for General Exceptions in Article XX. Article XX provides as follows:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: . . .
> (b) necessary to protect human, animal or plant life or health; . . .
> (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

There have been few GATT cases involving Article XX, so many of the concepts in it remain unclear. Since no environmental product standards have gone to GATT dispute settlement, further discussion of Article XX will be deferred to Section II.

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trade-restrictive manner. This obligation can cease only when the least trade-restrictive alternative is found.

67. *See* F. BURROWS, FREE MOVEMENT IN EUROPEAN COMMUNITY LAW 61-64 (1987).

68. *See* Case 302/86, Commission v. Denmark, 1988 E.C.R. 4607, 4631-32. The European Court of Justice upheld the principle that a country "should choose the means which least restricts the free movement of goods." *Id*. at 4629.

In summary, many environmental product standards are likely to be GATT legal under Article III. But when a standard has the effect of treating an imported product less favorably than a "like" domestic product, the standard will violate Article III. Standards that fail Article III may qualify as exceptions under Article XX, although this never has been explicitly addressed in the context of product standards. The existing GATT Standards Code adds more rules on product standards, but so far these have had limited influence. The new TBT Agreement written in the Uruguay Round is far more stringent than the current Code, and even than the GATT itself, because it mandates a "least trade restrictive" test.[69] The new agreement will supersede GATT Articles III and XX.

II. PROCESS STANDARDS

Process standards are the most complex kind of ETM.[70] They are concerned with how a product is manufactured, prepared, harvested, or extracted. In contrast to product standards, which relate to observable, or at least testable, characteristics of the product, process standards relate to aspects of production that cannot be ascertained by inspection.[71] While this product versus process distinction is useful, it should be recognized that considerable ambiguity exists.[72] After all, process standards can only be implemented when they are applied to a product. The critical distinction is that while process standards and product standards are

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69. Hilary F. French, *The GATT Blunder*, WORLD WATCH, Mar./Apr. 1994, at 2.

70. The product standard versus process standard distinction may have originated in the European Commission. *See* Council Declaration on the Programme of Action of the European Communities on the Environment, Annex 1, 1973 O.J. (C 112) 1.

71. Note that a process standard may be verifiable, even if nondetectable. For example, just as some dogs have breeding papers, documents can be used to certify that a specified process was used. That is the approach taken in the new dolphin safety standard in U.S. legislation. *See* 16 U.S.C. § 1417(d)(3) (Supp. 1994). Using such documents raises a GATT question as to whether tuna fish with a certificate is a like product to tuna fish without the certificate. *See* Natural Sweet Wines: Commission v. France, 2 C.M.L.R. 851, 852 (1988) (discussing how certificates can be used to verify standards for imports).

72. For example, consider natural, cultured, and imitation pearls. They have similar uses. But these pearls are distinguishable (and are treated differently in the harmonized tariff schedule) by the way in which they are produced. *See* Tariff Schedules of the United States, 19 U.S.C. § 1202 (1978) (replaced by Harmonized Tariff Schedule of the United States, Pub. L. 100-418, 102 Stat. 1148 (1988)) [hereinafter HTS]. Indeed, for natural and cultured pearls, the process method *is* the product.

both concerned with quality, process standards look beyond the quality of the product itself to the quality of the production process.

There are two types of process standards. One concerns processes which change, or may change, product characteristics. Many of these process standards involve food and drug safety.[73] For example, the Federal Food, Drug, and Cosmetic Act prohibits the introduction into interstate commerce of any "adulterated" food, which includes food that "has been prepared, packed, or held under insanitary [sic] conditions."[74] A recent concern focuses on the use of hormones in milk production.[75] Other current issues include the safety of genetically engineered food and irradiated food.[76]

But for the fact that the regulatory concern is undetectable in the product itself, the regulation of these practices could be viewed as product standards. If the concerns become detectable, a process standard can be rewritten as a product standard. The current GATT Standards Code refers to such regulations as "processes and production methods" (or PPMs), and exempts them from international discipline.[77] The new Uruguay Round Agreement and TBT Agreement would apply the new disciplines to such PPMs.[78]

The other type of process standards are far more controversial. They involve issues which do not affect the product itself, except perhaps in a metaphysical sense.[79] For example, under a recent U.S.

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73. For example, consider the issue of the transmission of antibiotic resistance from cattle to humans. Some consumers are concerned about the health effects of eating beef from cattle fed with antibiotics. Since adequate microbiological tests do not exist to detect drug-resistant bacteria, the only way to address this concern would be through a process standard. If a test were developed showing whether beef came from cattle that had been fed antibiotics, this process standard could be converted into a product standard.

74. 21 U.S.C. §§ 331(a), 342(a)(4) (1988).

75. *See* Kathleen Day, *Where Did the Milk Come From?*, WASH. POST, Feb. 13, 1994, at A1.

76. *See* Paula L. Green, *US Poised to Expand Irradiated Food List*, J. COM., Aug. 10, 1992, at 3A.

77. *See* Adrían Rafael Halpern, *The U.S.-EC Hormone Beef Controversy and the Standards Code: Implications for the Application of Health Regulations to Agricultural Trade*, 14 N.C. J. INT'L L. & COM. REG. 135 (1989) (discussing the PPM issue).

78. *TBT Agreement*, *supra* note 53, annex 1.

79. In the Dolphin Report, the parties could not agree on whether the tuna import rules were a PPM. *See Dolphin Report, supra* note 18, paras. 3.17-3.18, 30 I.L.M. at 1603. *See also* Statement by Mexico in the Dolphin Report. *Id.* (noting the difference between a "comparison criterion" and a PPM). Although the term "PPM" originally referred to process standards relating to the product, the term has taken a broader meaning in recent years to embrace all process standards. It is probably too late to return to the original meaning.

law, tuna that is not "dolphin safe" cannot be sold or transported in the United States.[80] This law would apply to domestically caught tuna as well as to foreign caught tuna. This kind of standard is not really a PPM. It is not regulated by the current GATT Standards Code, and would not be regulated under the new TBT Agreement.[81]

Some process standards lie right on the dividing line of the new TBT Agreement. Depending on one's perspective, they can be viewed as "related" to the product, or as not "related" to the product. For example, the EU has enacted a directive to ban the sale of cosmetics containing ingredients tested on animals.[82] This would apply to EU products as well as to imports. Such a standard differs from the dolphin safety standard because the harm to the dolphins is incidental to the tuna harvesting. By contrast, the use of animals for testing cosmetics is an integral part of the production process for cosmetics. Thus, a good case can be made that it is a PPM covered by the new GATT rules.

In regulating processing methods, the concern is usually not that a product itself is harmful to consumers. Instead, the concern is that the production process is harmful or wasteful either to particular groups, such as dolphins swimming near tuna, or to the ecosystem as a whole.[83] Environmental damage might arise directly from the act of taking an animal or plant, or indirectly from the negative externalities of the production process. Such externalities might harm a foreign environment, a domestic environment, the global commons (for example, the incidental killing of dolphins), or they might spill over into the environment (as do chlorofluorocarbons (CFCs)).[84]

One of the earliest process standards pertained to fish that were taken out of season. A U.S. law of 1887 prohibited the importation of mackerel caught between March and June, the

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80. 16 U.S.C. § 1417 (1993).

81. *See* GATT Standards Code, Annex 1 (definition of technical specification) and *TBT Agreement, supra* note 53, annex 1 (definition of technical regulation).

82. Council Directive 93/35, art. 1, 1993 O.J. (L 151) 32, 33.

83. Process standards also address the competitive unfairness of inconsistent national environmental regimes. *See* Earth Island Inst. v. Mosbacher, 746 F. Supp. 964, 968 (N.D. Cal. 1990), *aff'd*, 929 F.2d 1449 (9th Cir. 1991).

84. This view is not universally accepted. For instance, in a 1991 debate on trade and the environment at GATT, the representative from Sweden pointed out that the Nordic countries believed that the manner in which products are produced abroad could *not* affect the domestic environment. *See* GATT Doc. C/M/250 at 13.

spawning season.[85] There have been other process standards which pertained to the method of fishing. For example, a British law of 1889 prohibited the landing in Scotland of herring caught during the daylight or caught using beam or otter trawling.[86] Later, the Brioni Convention of 1921 prohibited mechanically-propelled drag nets in certain places and banned trade in fish caught using such nets or other prohibited methods.[87] Process standards are still used to restrict trade in violation of fishery or whaling treaties.[88] For example, the South Pacific Tuna Act of 1988 prohibits the shipment, sale, or importation of fish taken in violation of the treaty on South Pacific Fisheries.[89] Recently, the parties to the Convention for the Conservation of Anadromous Stocks in the North Pacific Ocean agreed to "take appropriate measures, individually and collectively, in accordance with international law and their respective domestic laws, to prevent trafficking in anadromous fish taken in violation of the prohibitions provided for in this Convention."[90]

Process standards, and import prohibitions, can be written in three different ways.[91] First, a nation could enact a measure aimed at *defiled items.* Defiled items are those products made using environmentally damaging methods. For example, the U.S. ban on the sale of dolphin-unsafe tuna is a defiled item standard.[92] Second, a country could have a measure aimed at items from nations engaging in environmentally damaging *production practices*. For example, the Tuna Convention Act empowers the Secretary of Commerce to

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85. 24 Stat. 434-35 (1887) (expired). This law is a process standard, rather than a prohibition, because it applies to mackerel *caught* during a particular time period.

86. Herring Fishery (Scotland) Act, 52 & 53 Vict. ch. 23, §§ 5, 6, 8 (1889).

87. Draft Convention for the Regulation of Fishing in the Adriatic between Italy and the Kingdom of the Serbs, Croats and Slovenes, 19 L.N.T.S. 39, 49, 51 (1923). *See* 82 L.N.T.S. 259, 275 (1928) (not in force).

88. JOZO TOMASEVICH, INTERNATIONAL AGREEMENTS ON CONSERVATION OF MARINE RESOURCES 28-29 (1943).

89. 16 U.S.C. § 973c(a)(13) (1988).

90. CONVENTION FOR THE CONSERVATION OF ANADROMOUS STOCKS IN THE NORTH PACIFIC OCEAN, art. III, S. Treaty Doc. No. 102-30, 102d Cong., 1st Sess. (1992). Anadromous fish (*e.g.*, salmon) ascend rivers from the sea during certain seasons for purposes of breeding.

91. As scientific analyses improve in the future, process standards based on production practices or government policy might be rewritten as defiled item standards. For example, a test showing whether tuna had been caught in close proximity to dolphins would enable the MMPA to be implemented in a country-blind manner.

92. 16 U.S.C. § 1417(a)(1) (1993).

prohibit tuna from countries whose vessels engage in "repeated and flagrant fishing operations" in a way that threatens the achievement of recommendations of the Inter-American Tropical Tuna Commission (IATTC).[93] The IATTC limits quantities of tuna which can be caught. Third, a nation could enact a measure aimed at items from countries whose governments fail to adopt environmentally sound *government policy*. For example, in 1991, the EU prohibited the use of leg hold traps in the European Community and banned the importation of certain furs from countries that fail to prohibit these traps. Both of these prohibitions come into effect in 1995.[94]

As used in this paper, a restriction is a *process standard* if the environmental concern has a connection to the product being regulated or taxed.[95] When the connection becomes tenuous or indirect, a process standard turns into a trade *sanction*. Although all ETMs are sometimes accused of being protectionist, it is probably process standards that stand the greatest danger of being manipulated for that purpose.[96]

A. Most Favored Nation Treatment and Like Products

When a process standard is applied to imported products, there will be instances when like products are admitted from Country A but rejected from Country B. This raises a GATT problem since Article I requires that countries provide most favored nation (MFN) treatment to imports.[97] Specifically, Article I requires that

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93. 16 U.S.C. § 951 (1988). For example, the Inter-American Tropical Tuna Commission places quantity limits on the tuna catch. *Id.* This is an import prohibition, not a process standard. A hypothetical example of a process standard based on production practices would be a restriction on the sale of automobiles from a company whose average fuel economy for its fleet is less than twenty miles per gallon.

94. Council Regulation 3254/91, 1991 O.J. (L 308) 1. This is a government policy rather than a defiled item standard.

95. The sufficiency of the connection is, of course, a subjective judgment. Consider a ban on commerce in products harvested in the *habitat* of an endangered species. Is this a product standard, a process standard, or a sanction?

96. A panel of experts convened for the Stockholm Conference of 1972 stated, "[w]hen the concern spreads from the quality of a product to the environment in which such a product was produced, the alarm bells should ring all over the world, for it would be the beginning of the worst form of protectionism." *See Environment and Development: The Founex Report*, *in* 586 INT'L CONCILIATION 28 (1972).

97. While the unconditional MFN principle is often cited as the cornerstone of the GATT, it should be noted that GATT requires such treatment for members only. *See* GATT, *supra* note 6, art. 1:1. A GATT member is free to inflict any form of discrimination on

> . . . with respect to rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.[98]

Whether a process standard violates this provision depends upon whether two products distinguishable only by a process standard are "like" products. For example, is a cosmetic containing ingredients tested on animals a "like" product to the same cosmetic whose ingredients are not animal-tested?

The conventional view is that process standards cannot be justified under Article III:4 because they violate the MFN requirement regarding "like" products. In the eyes of the GATT, the two products are "like" no matter how they are made. This conventional view can be traced to an early GATT decision known as Belgian Family Allowances.[99] This case concerned a Belgian levy on foreign goods purchased by local government bodies. Under Belgian law, a country could be exempted from this levy if employers in that country were required to pay a special tax and provide family allowances similar to those provided in Belgium. The GATT found that since the law discriminated between countries using different systems of family allowances, or using no system at all, the Belgian levy was inconsistent with Article I.[100] While the dispute concerned internal taxes rather than regulations, Robert Hudec points out that the case underlined the principle that "[r]equiring a country to have a

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nonmembers. A GATT member may also discriminate against new members in certain circumstances. GATT, *supra* note 6, art. XXXV (nonapplication of the Agreement). Of course, GATT members may have antecedent obligations toward nonmembers under bilateral treaties.

98. GATT, *supra* note 6, art. I:1. Article III:2 relates to taxes and is not discussed here.

99. *Belgian Family Allowances*, GATT BISD 1S/59 (Nov. 1952).

100. *Id.* paras. 3, 8.

family allowances program was exactly the kind of 'condition' which the MFN clause was designed to eliminate."[101]

Any process standard or tax based on foreign production practices or government policies would involve discrimination against "like" products in contravention of Article I:1. As one commentator explains, "differences in treatment of imports cannot be based on differences in characteristics of the *exporting* country which do not result in differences in the goods themselves."[102] But process standards based on item-specific determinations (for example, defiled items) can be a different matter.[103] So long as trade criteria are not expressed in terms of countries that do not qualify, such criteria do not discriminate and thus do not violate MFN treatment.[104] In the words of a Committee of Experts appointed under the League of Nations, if the trade restriction is "applicable to all nations equally, there is no violation of the [MFN] clause, even though it is certain that only a few nations will be able to meet the requirements."[105]

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101. ROBERT E. HUDEC, THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY 136 (2d ed. 1990). The decision was based on an Article III:2 tax rather than an Article III:4 regulation.

102. JOHN H. JACKSON, THE WORLD TRADING SYSTEM 138 (1989).

103. The harmonized tariff schedule contains a myriad of minute classifications based on the composition of similar products. Each of these classifications, presumably, meet the "like product" test, thus allowing differing tariff rates. Following this approach, the problem with a *production practices* standard (under Article I) is not its creation of a classification like dolphin-related tuna, but rather the presumption that every tuna from a target country fits that classification. For a contrary view by Mexico, see *Dolphin Report*, *supra* note 18, para. 3.16, 30 I.L.M. at 1603.

104. *See* HUDEC, *supra* note 101, at 136 n.5.

105. *Report Adopted by Comm. of Experts for the Progressive Codification of Int'l Law: The Most-Favoured-Nation Clause*, League of Nations Doc. C.205 M.79 1927 V (1927), at 10 (discussing the difference between criteria that describe and limit the trade "favor" and conditions for countries to qualify for the "favor"). *See also Memorandum on Discriminatory Tariff Classifications*, *Submitted to the Preparatory Comm. for the Int'l Econ. Conf.*, League of Nations Doc. C.E.C.P. 96 1927 II (1927), at 5-6 (explaining that the rule of equality requires different rates on articles that differ in quality); *Equality of Treatment in the Present State of Int'l Com. Rel.: The Most-Favoured-Nation Clause*, League of Nations Doc. C.379 M.250 1936 II.B (1936), at 10 (discussing the incompatibility with MFN treatment of certain country-related conditions); *Memorandum by the Chief of the Division of Commercial Treaties and Agreements (Hawkins) to the Assistant Secretary of State (Acheson)*, *in* 3 FOREIGN RELATIONS OF THE UNITED STATES 19-22 (1941) (noting that MFN treatment does not pretend to insure that a country's policy will be wholly nondiscriminatory or even equitable); RICHARD C. SNYDER, THE MOST-FAVORED-NATION CLAUSE 117 (1948) (noting that MFN treatment cannot remove the inequality caused by tariff classifications); M.C.E.J. BRONCKERS, SELECTIVE SAFEGUARD MEASURES IN MULTILATERAL

Seen from this perspective, a defiled-item process standard, like mackerel caught in season, fully meets MFN treatment because it is country-blind. As the GATT U.S. Beer Report panel pointed out, "the purpose of Article III is not to prevent contracting parties from differentiating between different product categories for policy purposes *unrelated* to the protection of domestic production."[106]

It should be noted that a *defiled item* process regulation never has been brought to GATT dispute settlement.[107] The Belgian Family Allowances dispute involved a government-policy tax and the dolphin case involved an import prohibition based on foreign production practices. While the opinion offered here is not yet backed by GATT case law, the EU follows this reasoning in its internal laws. Article 95 of the Treaty Establishing the European Economic Community, which parallels GATT Article III, has been interpreted to allow products to be differentiated according to the production process used, so long as the criteria are objective and are not designed to be protectionist.[108]

Finally, it should also be noted that there are two ways to view the defiled item distinction in the context of GATT Article III:4. One is that defiled and nondefiled items are not "like" products. The other is that they are "like" products, but that making a regulatory distinction between the two is not unfavorable treatment, so long as the distinction is applied in a consistent manner.

B. Scope of Article III

Although the U.S. ban on Mexican tuna was an import ban, rather than a process standard, the U.S. Trade Representative

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TRADE RELATIONS 64-66 (1985) (arguing that products are not unlike merely because they differ in price).

106. *U.S. Beer Report*, *supra* note 43, at para. 5.25 (emphasis added). *See also id.* at paras. 5.73-5.75. The panel made this observation with respect to Article III. It is possible that the panel might have a different view with respect to Article I.

107. A GATT panel considered the issue of a "like" product in a 1981 dispute involving Spanish tariffs on coffee. The panel rejected Spain's argument that the methods of cultivation of different coffee beans could be used to justify differential tariff treatment. *See Spain: Tariff Treatment of Unroasted Coffee*, GATT BISD 28S/102, at para. 4.6 (June 1981).

108. *See, e.g.,* Re: Natural Sweet Wines: Commission v. France, 2 C.M.L.R. 851, 852 (1988); Case 243/84, John Walker & Sons v. Ministeriet for Skatter og Afgifter, 1986 E.C.R. 877, at 884.

attempted to defend it under Article III:4.[109] The Dolphin Panel rejected this defense, but based its decision, not on the precedent of Belgian Family Allowances, but rather on a new definition.[110] Although Article III permits the application of internal regulations to imported products, the Panel concluded that internal regulations had to involve "products *as such*."[111] Since the MMPA's regulations relate to the method of harvesting tuna rather than to "tuna as a product," the panel reasoned that these regulations were beyond the scope of Article III:4.[112] As one commentator notes, the decision means that "production requirements may only be applied to imported products if the method of production has a bearing on the final characteristics of the product."[113]

The Panel also concluded that Article III:4 (the rule on regulations) did not cover processes by analogizing from Article III:2 (the rule on taxes). According to the Panel, "under the national treatment principle of Article III, contracting parties may apply border tax adjustments with regard to those taxes that are borne by products, but not for domestic taxes not *directly* levied on products."[114] The Panel concluded that it would be inconsistent to limit the application of this provision "to taxes that are borne by products while permitting its application to regulations not applied to the products as such."[115]

The Panel's decision is seriously flawed.[116] The Dolphin Panel did not cite any evidence from GATT's preparatory history to buttress its reliance on a scholastic interpretation of "products *as such.*"[117] Such documentation would probably be hard to find since Article III contemplates and specifically addresses regulations

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109. *Dolphin Report*, *supra* note 18, paras. 3.18-3.21, 5.8, 30 I.L.M. at 1603-04, 1617.

110. *Id.* paras. 5.10–5.15, 30 I.L.M. at 1617-18.

111. *Id.* para. 5.11, 30 I.L.M. at 1617 (emphasis added).

112. *Id.* paras. 5.10-5.12, 5.14-5.15, 30 I.L.M. at 1617-18.

113. Tom Garvey, *The EC Commission on Trade and the Environment*, *in* AGRICULTURE, THE ENVIRONMENT AND TRADE—CONFLICT OR COOPERATION? 230 (Caroline T. Williamson ed., 1993).

114. *Dolphin Report*, *supra* note 18, para. 5.13 (emphasis added).

115. *Id.*

116. *See* Belina Anderson, *Unilateral Trade Measures and Environmental Protection Policy*, 66 TEMP. L. REV. 751, 767 (1993) (turning the national treatment principle on its head).

117. The panel did not define what it meant by products "as such," nor did it explain the threshold of "suchness."

"requiring the mixture, processing or use of products in specified amounts or proportions."[118] Moreover, GATT Article X also recognizes regulations relating to "processing, mixing or other use," and requires only that they be published promptly.[119]

In addressing mixing regulations, the framers of the GATT had in mind regulations, for example, that required a certain percentage of butter in oleomargarine.[120] But if Article III allows requirements that a certain percentage of butter be included in margarine as such, then it should also allow that a certain percentage of "dolphin-safe" tuna be included in tuna as such.[121] As the United States delegate explained, Article III would not preclude a mixing regulation "requiring a product to be composed of two or more materials in a specified proportion, where all the materials in question are produced domestically in substantial quantities, and where there is no requirement that any specified quantity of any of the materials be of domestic origin."[122]

It might also be noted that the panel's finding that Article III did not extend to process standards was not absolute. Mexico had also challenged the U.S. law establishing a truth-in-labeling standard

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118. GATT, *supra* note 6, art. III:1. In addition, Article III:5 states that mixing regulations cannot require that specified portions "must be supplied from domestic sources." *Id.* at 7. Presumably then, mixing regulations that do *not* require a minimum content of domestic value are permitted. *See* WILLIAM ADAMS BROWN, JR., THE UNITED STATES AND THE RESTORATION OF WORLD TRADE 109 (1950). The United States did not oppose mixing requirements that simply fix the proportion of other products that must be used in making a given product.

119. GATT, *supra* note 6, art. X:1.

120. *See Background Material On Articles 13-15 and Chapter IV (Arts. 16-45) of ITO Charter*, U.S. Dep't of State, Mar. 31, 1949, Art. 18, at 13. *See also* CLAIR WILCOX, A CHARTER FOR WORLD TRADE 76 (1949).

121. Discussing this provision at a drafting session, the Cuban delegate said that "provided the regulation did not require that the product to be mixed had to be of domestic origin . . . such a regulation would not contravene the Article." U.N. Doc. E/Conf. 2/C.3/SR.40, at 6. The U.S. delegate (John Leddy) agreed with Cuba and noted that Article III would not preclude regulations "to enforce objective standards." *Id*. *See also supra* text accompanying note 108 (noting EU law allowing products to be differentiated according to production process used). *See also supra* note 108 and accompanying text for the connection to the EC precedent.

122. *Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment,* at 2-3*,* U.N. Doc. E/PC/T/A/SR/10 (1947). Whether or not a regulation specifying the percent of dolphin-safe tuna can be viewed as a mixing standard, it would seem clear that a regulation specifying the percent of recycled glass in containers is a mixing regulation permitted by Article III.

for dolphin-safe tuna.[123] Mexico raised several arguments, including the assertion that the provision violated MFN treatment.[124] The panel found that since there was no mandatory labeling requirement (only a requirement that if dolphin-safe labels were used they be accurate), the U.S. law was consistent with the GATT.[125] But in stating that a nation can prohibit an inaccurate product label regarding the production process, the panel acknowledges that Article III embraces some process issues.[126]

The analogy from GATT's rules on taxes is also flawed. The problem is not with the logic but with the panel's incomplete rendition of the Article III:2 provision. Article III:2 prohibits the application of taxes to imports "in excess of those applied, directly or indirectly, to like domestic products."[127] As explained in GATT's legislative history, "the word 'indirectly' would cover even a tax not on a product as such but on the processing of the product."[128] Thus, if Article III:2 permits process taxes to be applied to imports, there is no reason why Article III:4 should not permit process regulations to be applied to imports.

If Article III is interpreted as permitting defiled item regulations such as restrictions on driftnet-caught fish, there is a danger that the trading system could be undermined. After all, there are a wide variety of production methods in use around the world. If each country could insist upon its own methods for imported products, then international trade could be hindered severely. There are two solutions to this problem. First, far greater efforts are needed to establish international standards on production methods. Second,

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123. 16 U.S.C. § 1835.

124. *Dolphin Report*, *supra* note 18, para. 5.42, 30 I.L.M. at 1622.

125. *Id.* para. 5.42-5.44. The panel might have ruled the same way had the U.S. law required a label attesting to the dolphin safety (or lack thereof) of the tuna catch, but that issue was not before the panel.

126. Kirgis takes this point further and concludes that "if a conservation or environmental measure applies equally to the products of foreign states produced by equivalent processes under equivalent circumstances, it will pass most-favored nation muster." Frederic L. Kirgis, Jr., *Environment and Trade Measures After the Tuna/Dolphin Decision*, 49 WASH. & LEE L. REV. 1221, 1223-24 (1992).

127. GATT, *supra* note 6, art. III:2 (emphasis added).

128. *Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment*, at 3, U.N. Doc. E/PC/T/W 181 (1947). *Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment*, at 9, U.N. Doc. E/PC/T/A/SR/9 (1947).

the GATT would need to develop rules on like "processes." Discrimination between "like" products on the basis of the production method should not be permitted when the differences in method are superficial, or when the discrimination would afford protection to domestic production. The new Agreement on Sanitary and Phytosanitary Standards starts down this road with its rules on "equivalence."[129]

If process standards fit within the scope of Article III, the panel must then determine whether the ETM meets the Article III:4 obligation to provide national treatment. The term "like product" in Article III:4 does not necessarily mean the same as the term "like product" in Article I:1, but the case law has not diverged significantly. When a process standard is deemed to violate Article III, there remains another path to GATT vindication: Article XX.[130]

C. GATT Article XX

Some commentators have suggested that Article XX(b) and (g) cannot be invoked to justify import bans relating to the production process.[131] But it is hard to reconcile this view with the fact that Article XX(d) and (e) are invoked to justify import bans relating to the production process. Article XX(d) is used to justify import bans against goods made without the legal acquisition of intellectual property rights. Article XX(e) is used to justify import bans against goods made with prison labor.[132] The provision relating to the

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129. Uruguay Round Agreement, *supra* note 5, Part II, Annex 1A, section 4, at para. 14.

130. Although the usual practice of GATT panels is to consider the General Exceptions only when a trade measure fails to meet the normal GATT obligations, at least one panel has looked to Article XX as a shortcut to a determination as to whether a measure is GATT-consistent. *See United States: Imports of Certain Automotive Spring Assemblies,* GATT BISD 30S/107 (May 1983), at para. 50.

131. *See, e.g.,* McDorman, *supra* note 17, at 461, 473. McDorman stated that countries cannot look behind a good to determine if the production or manufacturing process was environmentally friendly. *Id. See also* George Foy, *Toward Extension of the GATT Standards Code to Production Processes*, 26 J. WORLD TRADE 121, 125 (1992) (discussing how Article XX(b) does not allow discrimination among products based on the process standards).

132. But in a 1993 speech, the GATT Deputy-Director General Charles R. Carlisle seemed to deny that Article XX permits trade restrictions based on production methods. *See* Trade and the Environment, GATT FOCUS NEWSLETTER, Mar. 1993, No. 97, at 4.

"products of prison labor" would have little meaning unless it can apply to process standards and process-related prohibitions.[133]

No one has pointed to any drafting history demonstrating that GATT's authors intended subsections (b) and (g) to be narrower than subsections (d) and (e). The legitimacy of applying Article XX(b) and (g) to production practices is further buttressed by the fact that environmental trade restrictions tied to the production process were in use long before the GATT was contemplated.[134] There is no evidence that GATT's authors sought to disallow them.[135]

The view that Article XX does not extend to process standards is often attributed to the Dolphin Panel.[136] But this seems a misreading of the Panel's report[137] which objects to "extrajurisdictionality"[138] in Article XX, not to process-based

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133. A law prohibiting the sale of goods produced by prison labor would be a defiled item standard and, therefore, would qualify under Article III. The United States proposed the exception in Article XX(e) because its law (Tariff Act of 1930, 19 U.S.C. § 1307 (1988)) was an import prohibition. Moreover, the U.S. law does not accord national treatment. The United States does not ban the *intrastate* sale of products of domestic prison labor (or the exportation of such products).

134. *See* Steve Charnovitz, *GATT and the Environment: Examining the Issues*, 4 INT'L ENVTL. AFF. 203, 205 (1992).

135. It is interesting to note that some trade treaties, which predated GATT, included an exception for applying domestic restrictions "imposed in respect of the production . . . of similar products." Convention Between the Government of the Union of South Africa and the Government of the Portuguese Republic Regulating the Introduction of Native Labour from Mozambique, Sept. 11, 1930, 98 L.N.T.S. 30, at 31.

136. *See, e.g.,* Illona Cheyne, *Environmental Treaties and the GATT*, 1 REV. EUR. COMMUNITY & INT'L ENVTL. L. 14, 17 (1992).

137. The Dolphin Panel raises concerns about process-based measures, but only in the context of Article III. There is some ambiguous dicta at the end of the panel's report that is probably the source of the confusion. The panel "recalled its finding that the import restrictions examined in this dispute, imposed to respond to differences in environmental regulation of producers, could not be justified under the exceptions in Articles XX(b) or XX(g)." *See Dolphin Report, supra* note 18, para. 6.3, 30 I.L.M. at 1623. But, the clause "imposed to respond to differences in environmental regulation of producers" is only the panel's description of the U.S. law being reviewed "in this dispute." The clause does not appear to establish a new GATT obligation.

138. This is a term invented by and not defined by the Panel. It seems to mean ETMs aiming to safeguard the environment outside one's own country. For a discussion of the difference between extrajurisdictionality and extraterritoriality, see Paul Demaret, *Environmental Policy and Commercial Policy: The Emergence of Trade-Related Environmental Measures (TREMs) in the External Relations of the European Community*, *in* THE EUROPEAN COMMUNITY'S COMMERCIAL POLICY AFTER 1992: THE LEGAL DIMENSION 377-78 (M. Maresceau ed., 1992).

ETMs.[139] It should also be noted that GATT Article VI permits discriminatory tariffs based on the production process used in a foreign country. This provision applies principally when the producer receives a government subsidy or sets its price too low.

Because Article XX is so pivotal to GATT's relationship with the environment, each of Article XX's prerequisites will be examined in turn. While Article I mandates the commensurate treatment of "like" products from different countries, the Article XX headnote[140] imposes the softer nondiscrimination requirement that there be no "arbitrary or unjustifiable discrimination between countries where the same *conditions* prevail."[141] Since the focus is on conditions, Article XX tolerates nonarbitrary, justifiable discrimination according to production practices.[142] In other words, under Article XX, "like" products can be treated differently based on the prevailing practices of production.[143]

Potentially, the most important prerequisite in Article XX disqualifies "disguised" restrictions on international trade.[144] This prerequisite is important because it enables the GATT to distinguish between legitimate ETMs (which are GATT-legal) and contrived or

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139. *Dolphin Report*, *supra* note 18, paras. 5.25–5.34, 30 I.L.M. at 1619-21.

140. The GATT Article XX headnote is based on a very similar provision in the International Convention for the Abolition of Import and Export Prohibitions and Restrictions of 1927. 46 Stat. 2461, art. 4(2) (1927) (not in force). During the debate on the drafting of this provision, the Economic Committee stated that this provision "in no way limits the right of States to take measures against a particular country where conditions are not the same." League of Nations Doc. C.I.A.P. 1 (1927), at 27.

141. GATT, *supra* note 6, art. XX (emphasis added). The meaning of "arbitrary" and "unjustifiable" in the context of Article XX has not been sufficiently explored. For instance, is it justifiable for the United States to ban tuna from countries where dolphin-unsafe harvesting methods are used, but to allow tuna imports from countries where dolphins are routinely caught and eaten? *See* Felipe Charat, *Mexico: No Threat to Dolphins*, J. COM., Nov. 5, 1991, at 8A.

142. This point rests solely on the terminology of Article XX. GATT, *supra* note 6, art. XX. This author is unaware of any pre-1947 import laws based on production practices that the drafters of the GATT may have been trying to cover.

143. Thus, one might agree with the Dolphin Panel that "a contracting party may not restrict imports of a product merely because it originates in a country with environmental policies different from its own." *Dolphin Report*, *supra* note 18, para. 6.2, 30 I.L.M. at 1622. But, a slight reformulation would lead to the opposite conclusion. Based on the analysis here, a contracting party *may* under Article XX restrict imports of a "like" product merely because it originates in a country using environmentally harmful production *practices* if such practices are: (1) different from its own (*i.e.*, soft national treatment) and (2) related to the product.

144. GATT, *supra* note 6, art. XX.

veiled measures (which can be ruled illegal). Since every trade measure, be it a tariff, tax or regulation, is qualified in some way, GATT has to take a hard look at any questionable limitation to ascertain its relevance to health or conservation. Unfortunately, the recent GATT panels which had the opportunity to police this prerequisite seemed unwilling to do so.[145]

Determining when restrictions are "disguised" can present difficult challenges.[146] For example, what if a country that does no fishing sets its dolphin mortality regulation at zero and the consequent exclusion of tuna boosts the country's beef industry? Or, what if a fur-producing country were to impose a total ban on the sale of genuine furs? Or what if Country A prohibited fruit imports harboring a harmful fly even though that fly was endemic in Country A?

To take a more subtle program, what if a nation declares that it will no longer admit wood or wood products from forests inhabited by the northern spotted owl? Since the national treatment and nondiscrimination prerequisites would be automatically met for spotted owls,[147] perhaps a nation's solicitude for other species, or for other environmental issues, could be a factor in determining whether such an import ban is a "disguised" restriction.

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145. Take the Thai Cigarette case where the GATT panel reached the right conclusion but for the wrong reason. *Thailand: Restrictions on Importation of Internal Taxes on Cigarettes*, GATT BISD 37S/200 (Nov. 1990) [hereinafter *Thai Cigarette Report*]. Thailand had prohibited the importation of cigarettes since 1980 while allowing the domestic production of cigarettes. Thailand defended its import ban as an Article XX(b) measure to protect health. It is difficult to imagine a clearer example of a "disguised restriction" on trade. But the GATT panel did not reject Thailand's Article XX defense for this reason. Indeed, the panel apparently did not even consider whether the Thai law was a disguised restriction. Instead, the panel found that the cigarette ban failed to meet Article XX because other less GATT-inconsistent measures, such as bans on cigarette advertising, could accomplish Thailand's goal of reducing consumption of cigarettes. *Id.* paras. 77-81 at 224. For a discussion of this case and of efforts by the United States to deal with cigarette controls in other countries, see Stan Sesser, *Opium War Redux*, NEW YORKER, Sept. 13, 1993, at 78.

146. One consideration might be the extent to which foreign countries can comply with the restriction. In the Dolphin case, Ecuador and Panama eventually chose to comply with the new MMPA standard. *Dolphin Report, supra* note 18, para. 2.7, 30 I.L.M. at 1599.

147. There would be no national or MFN treatment problems because the northern spotted owls exist only in the United States (Washington, Oregon, and California).

Article XX(b) requires that trade measures be "necessary" to protect life or health.[148] The GATT preparatory history suggests that this meant "necessary" in a scientific sense.[149] Yet this subject received little attention at that time.[150] Recent GATT adjudication has focused on whether an ETM under Article XX(b) is "necessary" in a theoretical rather than a scientific sense. The Thai Cigarette Panel ruled that a measure would be considered "necessary" only if it "entails the least degree of inconsistency with other GATT provisions."[151] This is often referred to as the least-GATT-inconsistent test.[152]

It is sometimes suggested that a product labeling requirement could be substituted for an environmental or health-related trade restriction.[153] At least one GATT specialist has suggested that the current world trade ban on ivory is "unlikely" to meet the *necessary* test.[154] Certainly, the armchair theorist will always be able to conceive of less GATT-inconsistent alternatives that "might" achieve environmental goals. This is especially true if one is not constrained by practicality. Even Mexico, which for years has stonewalled diplomatic attempts to protect dolphins, had the chutzpah to tell the Dolphin Panel that instead of unilateral action like the MMPA, the United States should have relied upon more GATT-consistent means like "international cooperation."[155]

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148. It is unclear whether Article XX(b) would cover laws relating to humane treatment of animals, such as EC regulations on leg hold traps.

149. *See Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment*, U.N. Docs. E/PC/T/A/PV/30 (1947) at 8; *see also Third Committee: Commercial Policy, Summary Record of the Thirty-fifth Meeting*, U.N. Conference on Trade and Employment at 6-7, U.N. Doc. E/Conf.2/C.3/SR.35 (1948).

150. *See* Charnovitz, *supra* note 11, at 44. It is interesting to note that the International Convention for the Protection of Plants of 1929 provided that parties would not prohibit plant imports from a country "unless some plant disease or pest be ascertained to be actually present within the territory of the Country and there be a genuine necessity for protecting the crops" of the importing country. International Convention for the Protection of Plants of 1929, Apr. 16, 1929, art. 8, 126 L.N.T.S. 305, 319.

151. *Thai Cigarette Report*, *supra* note 145, para. 74.

152. *See* Charnovitz, *supra* note 134.

153. *See* GATT Doc. C/M/250 at 9 (suggestion of the representative from New Zealand). *See also Thai Cigarette Report*, *supra* note 145, paras. 77-78, at 224-25.

154. Piritta Sorsa, *GATT and Environment*, THE WORLD ECONOMY, Jan. 1992, at 124-25.

155. *Dolphin Report*, *supra* note 18, paras. 3.34, 5.24, 30 I.L.M. at 1606, 1619. Since the passage of the MMPA in 1972, the United States has tried on numerous occasions to attain international agreements on commercial fishing operations harmful to marine

Nevertheless, there is no reason to read "necessary" in Article XX(b) as meaning "absolutely necessary" in the sense that without the action, achievement of the policy goal would be impossible. The GATT does not require that tariffs, subsidies, internal taxes or other measures be screened as to their necessity. Thus, it is illogical that the one part of GATT called "General Exceptions" should be the one subject to the most stringent "necessary" test. Moreover, as Justice Marshall pointed out in his famous disquisition on the word "necessary" in *McCulloch v. Maryland*,

> to employ the means necessary to an end is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable.[156]

Like Article XX(b), Article XX(g), concerning the conservation of exhaustible natural resources, has suffered serious impairment in the course of being interpreted by GATT panels.[157] Although the authors of the GATT saw a clear need for this exception, they wanted to prevent it from being used as a restriction on market access or as protectionism.[158] To guard against such abuses, the GATT required parallel restrictions on domestic production or consumption.

The GATT panel analyzed Article XX(g) in the Canadian Herring and Salmon case of 1988.[159] In that case, the GATT panel declared that an *export* restriction could qualify under Article XX(g) only "if it was primarily aimed at rendering effective" restrictions on domestic production or consumption.[160] The panel offered no real

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mammals. *See* MMPA, *supra* note 15, § 108 (current version codified at 16 U.S.C. § 1378 (1988)). It might also be noted that Mexico delayed 18 years before becoming the 112th country to embrace international cooperation through CITES.

156. 17 U.S. 310, 413-14 (1819).

157. The Dolphin Panel used different rationales for declaring that Article XX(b) and (g) were not extrajurisdictional. The argument on Article XX(b) is based on GATT's negotiating history. *See Dolphin Report*, *supra* note 18, paras. 5.25-5.26, 30 I.L.M. at 1619-20. The argument on Article XX(g) is based on a gloss from a previous panel report. *Id.* para. 5.31, 30 I.L.M. at 1620-24.

158. *See* Testimony of Clair Wilcox in "International Trade Organization," Hearings before the U.S. Senate Committee on Finance, Mar. 1947, at 135, 412.

159. *Canada: Measures Affecting Exports of Unprocessed Herring and Salmon*, GATT BISD 35S/98 (Mar. 1988).

160. *Id.* para. 4.6.

justification for its conclusion that the trade measure had to contribute to the effectiveness of the domestic measure.[161] What makes this omission so troubling is that neither the legislative history of the GATT[162] nor the semantics of Article XX(g)[163] support the conclusion that any trade measure must augment a domestic measure.

Because the GATT Council had adopted this questionable interpretation, the Dolphin Panel was able to build upon it for constricting Article XX(g) even further. The panel held that under Article XX(g), any trade measure to conserve natural resources, even an *import* restriction, has to be primarily aimed at effectuating domestic restrictions. Since domestic restrictions on production or consumption only involve resources under a country's jurisdiction, a trade measure to conserve nondomestic resources cannot facilitate a domestic restriction. Therefore, the panel reasoned that no "extrajurisdictional" trade measure can possibly qualify under Article XX(g).[164]

Another reason implied by the Dolphin Panel for its decision is that Article XX lacks "criteria limiting the range of life or health protection policies, or resource conservation policies, for the sake of which they [the Article XX exceptions] could be invoked."[165] But it seems inappropriate to deny access to Article XX because the article lacks detailed criteria. If the authors of Article XX had desired such criteria, they could have included them.[166]

The Dolphin Panel argued that the preferable solution for the lack of criteria is action by the GATT members to amend the GATT, not interpretative action by a panel.[167] This logic is contorted

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161. *See id.*

162. *See Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment*, U.N. Docs. E/PC/T/A/PV/25 (1947) at 30; *Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment*, U.N. Doc. E/PC/T/A/PV/30 (1947) at 18.

163. GATT, *supra* note 6, art. XX(g), at 38. The more obvious interpretation is that the import and domestic measures must be jointly effectuated. Another interpretation is that the import measures be made effective through conjoining with the domestic measures.

164. For further analysis and criticism of the panel's finding, see Janet McDonald, *Greening the GATT: Harmonizing Free Trade and Environmental Protection in the New World Order*, 28 ENVTL. L. 397, 438-50 (1993).

165. *Dolphin Report, supra* note 18, para. 6.3, 30 I.L.M. at 1623.

166. Actually the drafters considered, but did not accept, some criteria. *See* Charnovitz, *supra* note 11, at 44-45.

167. *Dolphin Report, supra* note 18, para. 6.3, 30 I.L.M. at 1623.

however. Why should Article XX rights be unavailable to GATT members until the GATT has adopted criteria to limit such rights? Additionally, why is the panel willing to erase such rights by interpretative action?

The Dolphin Panel is correct in observing that inconsistent national health standards can hinder trade.[168] But the panel goes too far in suggesting that this inconsistency will undermine the GATT.[169] The GATT has operated in a world of unharmonized environmental standards for over 45 years. So there is no reason to believe it cannot continue doing so.

In summary, the GATT rules on process standards are uncertain. It can be argued that defiled item standards would be legal under Article III.[170] Production practice and government policy standards are not legal under Article III. All three types of process standards, if implemented for environmental reasons, should be legal under a strict construction of Article XX. But given the recent "judicial" activism by GATT panels in narrowing the environmental exceptions, the future status of Article XX is uncertain.

III. IMPORT BANS

Import bans can be carried out in several ways.[171] They can be aimed at the item itself (for example, a turtle), products made from the item (for example, tortoise shell eyeglasses), or products derived from a process that entails the item (for example, shrimp caught in ways that kill turtles).

Import bans for domestic environmental reasons became a common practice during the late 19th century. For example, in 1877 Great Britain authorized a ban on potatoes and other vegetables in order to keep out the Colorado beetle.[172] In 1900, the U.S. Lacey Act

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168. *Id.* para. 5.27, 30 I.L.M. at 1620.

169. It should be recalled that the goal of the GATT is not free trade *per se*, but rather the elimination of discrimination and the reduction of tariffs and other barriers. *See* GATT Preamble, GATT, *supra* note 6, at 1.

170. *See* David Palmeter, *Environment and Trade: Much Ado About Little?*, J. WORLD TRADE, 55, 66 n.22 (1993). "Non-discriminatory process standards that are not disguised protectionist measures would appear to be GATT-legal." *Id.*

171. The classification of a measure as an import ban rather than a product or process standard is based on the context of the law and on how the law is written. Import bans can often be recast as standards, and vice versa.

172. Destructive Insects Act, 40 & 41 Vict. ch. 68, § 1 (1877).

made it unlawful to import any "wild animal or bird" except under permit.[173] In 1910, the United States prohibited the importation of insecticides injurious to vegetation.[174] In 1912, the United States banned the importation of trees, shrubs, and buds unless they were inspected and found "to be free from injurious plant diseases and insect pests."[175] These are examples of simple import bans or embargoes.

An interesting episode occurred in 1992 when the U.S. Treasury Department canceled the label for "Black Death Vodka" from Belgium.[176] Under the U.S. Federal Alcohol Administration Act of 1935, bottled liquor cannot be imported if its label is deceptive to the consumer.[177] The Treasury Department believed that the label, which depicted a skull, implied black death. Because the vodka was *not* harmful to the consumer, however, the label was deceptive in suggesting that the product was unhealthy. Thus, Belgium might have complained to the GATT that the United States was banning its vodka because it was not unhealthy.

Before turning to GATT rules, it is useful to summarize some of the categories presented so far. Standards and import bans can be applied to products or to the processes used to produce the products. Both standards and import bans can be jurisdictional or extrajurisdictional. A jurisdictional measure is aimed solely at the domestic environment and health. An extrajurisdictional measure looks more broadly at a foreign, or global, environment and world health issues as demonstrated in Table I.

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173. Lacey Act, § 2, 31 Stat. 187-88 (1900) (current version codified at 18 U.S.C. § 42 (1988 and Supp. 1992)). The mongoose, fruit bat, English sparrow, and starling were specifically proscribed in the 1900 Act. Congress added criminal penalties in 1935.

174. Insecticide Act, 36 Stat. 331-33 (1910) (repealed, but replaced by similar legislation codified at 7 U.S.C. § 136 (1988)).

175. Nursery Stock Act § 1, 37 Stat. 315-16 (1912) (current version codified at 7 U.S.C. § 154 (1988)).

176. *Liquor: Name Your Poison*, TIME, Apr. 13, 1992, at 53. After the Treasury Department canceled the label, the importer sought and received a preliminary injunction from the U.S. District Court in San Francisco blocking the government action. Cabo Distributing Co. v. Brady, 821 F. Supp. 582 (N.D. Cal. 1992).

177. Federal Alcohol Administration Act § 2(e) (1935) (current version codified at 27 U.S.C. § 205(e) (1988)).

Table I

MATRIX OF ENVIRONMENTAL TRADE MEASURES		
	PRODUCT	PROCESS
JURISDICTIONAL	Unleaded fuel autos	Adulterated food
EXTRAJURISDICTIONAL	Ivory	Dolphin-safe tune

A. GATT Article XI

Import bans, and export bans, violate GATT Article XI which disallows "prohibitions or restrictions other than duties, taxes or other charges."[178] In other words, GATT members cannot use import bans because they are tantamount to a quantitative restriction of zero. Article XI does provide for three exceptions, but none of them are applicable to typical ETMs.[179]

This disallowance of import bans by GATT has great significance for ETMs. Under CITES, trade in "specimens" (living or dead) of endangered species must be carried out in accordance with regulations requiring both import and export permits (or re-export certificates).[180] The treaty lists several criteria for the granting of such import permits by national governments including advice from a "Scientific Authority" that the import will be for purposes which are not "detrimental to the survival of the species involved."[181] Strictly speaking, CITES does not prohibit imports. But it does mandate a licensing system under which commercial trade will regularly be

178. GATT, *supra* note 6, art. XI:1.

179. For a discussion of the agricultural and fisheries exception, see Ted L. McDorman, *The GATT Consistency of U.S. Fish Import Embargoes To Stop Driftnet Fishing and Save Whales, Dolphins and Turtles*, 24 GEO. WASH. J. INT'L L. & ECON. 477, 513-15 (1991). *See also infra* note 261 and accompanying text (discussing U.S. timber export ban).

180. CITES, *supra* note 10, art. III. The discussion of CITES in this article relates to species listed in CITES Appendix I which are "all species threatened with extinction which are or may be affected by trade." *Id.* art. II:1. There are different rules for trade in Appendix II and Appendix III species. Appendix II includes species which may become threatened or species which must be subject to regulation (*e.g.*, look-alike) in order to effectuate control of Appendix I trade. *Id.* art. II:2. Appendix III includes all species that any party regulates in its jurisdiction for which international cooperation in controlling trade may be needed. *Id.* art. II:3. Permits are also required from nonsignatories. *See id.* art. X. About 119 species are listed in Appendix I.

181. *Id.* art. III:3(a).

prohibited.[182] Therefore, actions under CITES would be inconsistent with GATT Article XI.[183]

Because CITES is a convention on "International Trade," the Article III defense would seem inapplicable. Since CITES imposes no requirements on domestic sales or consumption (for example, it does not regulate domestic trade in endangered species),[184] the treaty can hardly be an internal regulation enforced at the border.[185] But even if CITES did mandate comparable domestic restraints, there would still be a GATT problem with the contingent import approach.[186] This approach is used in other environmental agreements and laws,[187] and involves tying imports to the approval of the exporting nation.[188] The problem is that any discrimination between "like" products based on certain situations in the country of origin would violate GATT Article I.[189] Of course, an exporting nation which does not grant approval is unlikely to complain in the

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182. Import licenses for commercial trade would be denied because under CITES, the Management Authority of the importing country must be "satisfied that the specimen is not to be used for primarily commercial purposes." *See* CITES, *supra* note 10, art. III:3(c).

183. While a licensing system established to assure prior consent may not contradict Article XI if the licenses are issued without undue delay, a licensing system in which licenses are normally denied would violate Article XI. *See Trade and Environment*, GATT Doc. L/6896 (1991), at 30.

184. The U.S. Endangered Species Act, which implements CITES, does impose restraints on the domestic sale and transportation of protected species. *See* 16 U.S.C. § 1538(a)(1) (1988). Although this law is "extrajurisdictional," it does not need an Article XX exception because it qualifies under Article III. There could be a GATT problem if the Endangered Species Act applied only to *interstate* commerce.

185. It could be argued that if CITES is implemented by a country in conjunction with a domestic law that prohibits internal trade in endangered species, then the combination of the treaty and the law will meet Article III. *See* James Cameron & Jonathan Robinson, *The Use of Trade Provisions in International Environmental Agreements and Their Compatibility with the GATT*, 2 Y.B. INT'L ENVTL. L. 3, 11 n.29 (1991).

186. T.E.G. GREGORY, TARIFFS: A STUDY IN METHOD 113-15 (1921) (discussing the use of the term "contingent").

187. For example, the MMPA bans the importation of marine mammals from countries where commerce in such marine mammals is illegal. *See* 16 U.S.C. § 1372(c)(2)(B) (1988).

188. For example, a Pan-American Convention of 1940 obliges parties to prohibit the entry of any species "protected by the country of origin unless accompanied by a certificate of lawful exportation." Convention on Nature Protection and Wild Life Preservation in the Western Hemisphere, Oct. 12, 1940, art. IX, 565 Stat. 1354, 1368.

189. This assumes that the GATT would not view the presence or absence of export permits as a determinant of the *likeness* of two otherwise identical products. But if public interest in the environmental pedigree of certain products grows, one could imagine environmental certifications being viewed as key product "characteristics." Such certifications could be done by producers, neutral observers, or governments.

GATT. Nor do consumers in the country banning the import have a right to complain to the GATT. So for practical purposes, contingent import provisions will not be ruled GATT-illegal.

Similarly, any law requiring that a product be imported only from countries with specific national attributes violates GATT Article I.[190] For example, under the U.S. African Elephant Conservation Act of 1988, it is unlawful to import raw ivory from a country which does not produce ivory.[191] A more difficult issue is whether a ban on tropical timber violates Article I if timber from temperate or boreal forests is permitted. Similarly, could a country impose inconsistent conservation regimes on Atlantic salmon versus Pacific salmon?

Also, import measures designed to keep out disease may be inconsistent with national and MFN treatment if it cannot be shown that the imported product transmits or is affected by the disease. For example, the Tariff Act of 1930 banned meat from countries whose animal stocks were infected with foot and mouth disease.[192] Because this law would have been vulnerable under NAFTA's new disciplines, the North American Free Trade Agreement Implementation Act of 1993 reduced the stringency of this import ban by allowing the U.S. Secretary of Agriculture discretion to allow imports from regions he determines to be disease-free.[193]

Some treaties require discrimination against nonparties as a way of creating an incentive to join the treaty. For example, the Montreal Protocol on Substances that Deplete the Ozone Layer regulates CFCs, halons and other listed chemicals.[194] The Protocol requires parties to ban the importation of these chemicals from any nation that is not a party to the agreement.[195] As with any import

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190. But the contracting parties have agreed to permit geographical discrimination in favor of developing countries. In 1971, a waiver of MFN obligations was granted to accord preferential tariff treatment to developing countries. *See Generalized System of Preferences*, GATT BISD 18S/24 (June 25, 1971).

191. African Elephant Conservation Act (16 U.S.C. § 4223 (1988)). An "ivory producing country" is an African country with a population of African elephants. *Id.* § 4244(7). In GATT terms, the "favor" is being accorded only to particular nations.

192. 19 U.S.C. § 1306 (1988).

193. Pub. L. No. 103-182, § 361(d), 107 Stat. 2123 (1993).

194. Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, art. 4:1, 26 I.L.M. 1541 [hereinafter Montreal Protocol].

195. *Id.* at 1554-55.

ban, this provision is inconsistent with GATT Article XI.[196] The requirement for discrimination makes the treaty inconsistent with Article I. Article III would seem an improbable justification for what are clearly international trade controls.

The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal also requires trade discrimination. Specifically, parties may not import or export "hazardous wastes or other wastes" from or to a nonparty.[197] Like the Montreal Protocol, the Basel Convention violates Article XI.[198] Since the Basel Convention also requires hazardous waste control within a country, certain provisions in this treaty might meet the national treatment requisite in GATT Article III.[199]

B. GATT Article XX

Import prohibitions that are inconsistent with GATT Articles I or XI may nevertheless be allowable under the General Exceptions in Article XX.[200] It is generally agreed that under Article XX(b), GATT members may "give priority to human health over trade liberalization."[201] For instance, a country might ban the importation of hazardous waste even though similar waste is produced domestically. The country could try to justify the ban under Article

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196. The discriminatory administration of quantitative restrictions also would violate GATT Article XIII (Non-discriminatory Administration of Quantitative Restrictions). GATT, *supra* note 6, art. XIII. But this rule is usually brought to bear only for quotas acceptable under Article XI.

197. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Mar. 22, 1989, 28 I.L.M. 657, 662 [hereinafter Basel Convention]. But under Article 11, parties may enter into arrangements with nonparties regarding the transboundary movement of waste provided that such arrangements "stipulate provisions which are not less environmentally sound than those provided for by this [the Basel] Convention." *Id.* art. 4:5, 28 I.L.M. at 668.

198. It could be argued that the Basel Convention regulates services (*i.e.*, hazardous waste disposal) rather than trade in goods, and is therefore not covered by the GATT. But since some waste products regulated by the Convention do have positive market value (*e.g.*, scrap metal), GATT rules would be relevant for at least some regulation under the Convention.

199. Basel Convention, *supra* note 197, art. 4:2(a)-(c), 4:7, 4:12, 28 I.L.M. at 662, 663.

200. Most environmental trade measures are in the form of prohibitions. Other quantitative restrictions, such as quotas, would not seem to fit with Article XX(b), but could fit a conservation program under Article XX(g). *See* GATT, *supra* note 6, art. XX.

201. *Thai Cigarette Report*, *supra* note 145, para. 73, at 222-23. But the panel also points out that measures must be "necessary" in order to be covered under Article XX(b). *Id.* at 223.

XX(b) on the grounds that transporting waste over populated areas is too dangerous.

Article XX(b), however, requires that such measures be "necessary." It is important to understand that what may be perceived as "necessary" to ban in one country may be perceived quite differently in another. For example, in 1992, the U.S. government prohibited the importation of "haggis," Scotland's national dish, on the grounds that it was unfit for human consumption.[202] If such a case were to come before a GATT panel, there may be differing views as to whether such an import ban would be "necessary" under Article XX. Since haggis is eaten in Scotland, it is arguably "fit" for human consumption. But the United States might argue that it is not fit for American consumption. So far, no Article XX case has dealt with such an issue.

Whether Article XX(b) permits governments to give priority to animal or plant health over trade liberalization is in dispute. One view is that Article XX(b) applies equally to all forms of life. Yet it is sometimes argued that an animal has to be endangered to be covered by Article XX(b).[203] Since Article XX(b) is not generally perceived as requiring that humans be endangered before a trade-related health measure can be justified, it is unclear how a different requirement for animals might have come about.[204]

Some commentators suggest that Article XX(b) is too limited to cover many important environmental trade measures.[205] This view can be challenged, however, when one considers the fact that anything which affects the health of a living organism could be reached by Article XX(b). While there may be some environmental concerns, such as recreational opportunities, that are not addressed by

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202. *See Haggling over Haggis Brings on Heart Burns*, SAN DIEGO UNION-TRIB., Jan. 24, 1992, at D-2. Haggis is made from minced sheep's heart, lungs and liver mixed with oatmeal, onions, and black pepper.

203. *See Dolphin Report*, *supra* note 18, para. 4.29, 30 I.L.M. at 1645-46 (suggestion by the delegate from Venezuela).

204. Mexico apparently recognized this logical difficulty because it argued in the Dolphin Report case that Article XX(b) protected humans, animals and plants "solely as a population . . . and not as separate individuals." *Id.* para. 3.37, 30 I.L.M. at 1606. Mexico offered no evidence for this anthropocentric interpretation.

205. *See, e.g.,* Steven Shrybman, *International Trade and the Environment: An Environmental Assessment of the General Agreement on Tariffs and Trade*, ECOLOGIST, Jan./Feb. 1990, at 30,33. *See also Dolphin Report, supra* note 18, para. 4.18, 30 I.L.M. at 1614 (statement by the delegate from Japan).

the life and health standards of Article XX(b), every critical international environmental issue would seem to be incorporated in the Article.[206]

Furthermore, the scope of Article XX(g) is as broad as that of Article XX(b).[207] Most of the world's serious environmental issues, such as climate change, ocean pollution, disappearing forests, driftnet fishing, recycling, and biodiversity, can be characterized as a natural resource lacking conservation.[208] Only the last of these issues, however, was specifically considered in writing the GATT. In 1947, the Netherlands proposed a GATT exception for export control measures "necessary to protect the rights of the grower [of] scientifically improved planting material."[209] But this proposal was not adopted.[210]

To qualify for either of GATT's environmental exceptions, however, an ETM would have to meet the two prerequisites in Article XX's headnote: the discrimination and the disguised restriction tests.[211] As noted above, there is no "like product" requirement in Article XX. Discrimination is allowed so long as it is not arbitrary or unjustifiable.[212] For example, the U.S. import regulations

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206. *See* Michel Prieur, *Environmental Regulations and Foreign Trade Aspects*, 3 FLA. J. INT'L L. 85, 86 (1987). Article XX's exceptions are very much linked with today's environmental issues. *Id.*

207. Looking back to the drafters' intent, it can be argued that Article XX(g) applies only to export restrictions and then only to exhaustible, as opposed to renewable, natural resources. *See* Charnovitz, *supra* note 11, at 45-47. But some evidence of the drafters' intention for this provision to apply to animals has since come to light. *See* U.N. Doc. E/PC/T/A/40(1) at 4-6. In any event, since it began to be invoked in GATT cases in 1988, however, this provision has been given broader application than nonrenewable resources.

208. Technically, an "exhaustible" natural resource does not cover living resources, a point noted by Mexico in the Dolphin Report arguments. *See Dolphin Report, supra* note 18, para. 3.43, 30 I.L.M. at 1607. But the authors of the GATT probably had a broader application in mind, which has been followed by recent GATT panels. *See* Charnovitz, *supra* note 11, at 44-47, 51.

209. U.N. Doc. E/PC/T/W.255.

210. U.N. Doc. E/PC/T/A/SR/33 at 3-4.

211. It should be noted that these prerequisites are not required in GATT Article XXI (Security Exceptions). Each contracting party is allowed to take action "it considers necessary" to protect security interests relating to nuclear materials, arms, and military traffic, taken in time of war or emergency. *See* GATT, *supra* note 6, art. XXI, at 38-39.

212. For an example of unjustifiable discrimination, consider the Clinton Administration's ban on the importation of semiautomatic assault pistols even though the sale of domestically produced pistols is permitted. *See* TIME, Dec. 20, 1993, at 30. The ban violates GATT Article XI and would seem difficult to justify under Article XX(b) given the

implementing CITES distinguish between species that are captive-bred and those caught in the wild.[213] Such discrimination is justifiable because trade in captive-bred species does not diminish the population in the wild.

Before the Dolphin decision, it was commonly thought that many of the ETMs breaching Article III or XI qualified for an Article XX exception.[214] For example, when the Montreal Protocol was negotiated, a special clause was added to bring its import controls into greater GATT conformity.[215] Under this clause, parties may continue to import CFCs from a nation that is a nonparty if the parties collectively determine that nation to be in full compliance with the treaty.[216] The purpose of this clause apparently was to make the Protocol more consonant with "softer" MFN practice by tying the discrimination to the country's production practices regarding CFC control rather than to the government policy regarding ratification of the Montreal Protocol.[217]

The assumption of the Protocol's drafters was that a country phasing out CFCs would meet the "same conditions" requirement in the headnote of Article XX whether or not that nation chose to ratify the treaty.[218] Whether the country had ratified the treaty was thought

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domestic production of the product. The ban may be permitted by Article XXI(b)(ii), however, if it is deemed part of U.S. "essential security interests."

213. 50 C.F.R. § 23.13(e) (1993). This is permitted by CITES, VII-4, *supra* note 10, art. VII:4.

214. *See* ROBERT BOARDMAN, INTERNATIONAL ORGANIZATION AND THE CONSERVATION OF NATURE 89-92 (1981).

215. *See* Peter Menyasz, *International Agreement to Protect the Ozone Layer Hailed as Precedent for Global Environmental Solutions*, 10 INT'L ENV'T REP. 531, 532 (1987). *See also* RICHARD ELLIOT BENEDICK, OZONE DIPLOMACY: NEW DIRECTIONS IN SAFEGUARDING THE PLANET 91 (1991). *See also GATT, General Agreements on Tariffs and Trade*, INT'L TRADE, vol. 1, 1990-91, at 32.

216. Montreal Protocol, *supra* note 194, art. 4.8, at 150-55. In the 1990 amendments, this clause was also extended to some of the Protocol's other trade restrictions. At the meeting of the Montreal Protocol parties in November 1993, several nonparties were found to be in compliance with this provision. *See* UNEP/OZL.Pro.5/12, Decision V/3.

217. Discrimination against a country that fails to ratify a treaty is viewed here as a prohibition or process standard—rather than a sanction—if the trade being prohibited is directly related to the environmental concern. Any policy change sought must also be directly related to the environmental concern. In other words, if the Montreal Protocol prohibited trade in CFCs from countries that had not ratified the Genocide Convention, that would be a sanction.

218. Certainly a CFC made in a nontreaty country will be indistinguishable from a CFC made in a treaty country, both in chemistry and in its impact on the environment. They are "like" products, but Article XX is not based on a like product test.

to be less defensible as a "same" condition.[219] While this optional procedure helps, it does not eliminate all of the Montreal Protocol's potential inconsistencies with Article XX. Discrimination can still occur between imports from noncomplying signatories, which are permitted, and imports from noncomplying nonsignatories, which are prohibited.[220]

If the Dolphin Panel's views are accepted that Article XX does not cover the protection of *foreign* life or health or the conservation of *foreign* resources, then many of the treaties and laws discussed above, which violate Articles I, III or XI, cannot be "saved" by Article XX. Certain trade restrictions in treaties on migratory birds, endangered species (CITES), and ozone protection, and the U.S. laws on African elephants would lie outside of Article XX's shelter.[221] For example, the U.S. Endangered Species Act would appear to violate the GATT since import permits may be granted only "for scientific purposes or to enhance the propagation or survival of the affected species."[222] As noted earlier, the Dolphin Panel offered little support for its radical thesis that "extrajurisdictional" trade measures are GATT-illegal.[223] The panel also failed to square its

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219. Johan G. Lammers, *Efforts to Develop a Protocol on Chlorofluorocarbons to the Vienna Convention for the Protection of the Ozone Layer*, 1 HAGUE Y.B. INT'L L. 225, 256-57 (1988).

220. The United States discriminates in this way under its import ban of CFCs. *See* 40 C.F.R. § 82.4(d) (1992).

221. For endangered species, migratory birds, whales or elephants, it is the import bans that raise the spectre of extrajurisdictionality. (Concern about migratory birds and whales might be defended on the grounds that they are occasional residents.) For the Montreal Protocol, it is the export ban which is more questionable, although it might be defended on the grounds that ozone depletion anywhere is a danger to people everywhere.

222. 16 U.S.C. § 1539(a)(1)(A) (1988). While scientific purposes would be jurisdictional, enhancing the propagation of a species is extrajurisdictional unless the species also exists in the United States.

223. The Dolphin Panel noted the past practice of GATT panels in interpreting Article XX "narrowly." *Dolphin Report*, *supra* note 18, para. 5.22, 30 I.L.M. at 1619. In contrast, the Dolphin Panel suggested that the United States had offered a "broad interpretation" of Article XX(b). *Id.* para. 5.27, 30 I.L.M. at 1629. But narrowness and broadness are relative. In light of the long history of the health exception in trade treaties and the negotiating records for Article XX, it could be argued that the United States is offering the *narrow* interpretation (*i.e.*, the terms of Article XX as understood by the drafters) and the GATT panel relying upon a *broad* interpretation that balances other goals against U.S. environmental concerns. In particular, the panel states that it is weighing the consequences of its decision on the "operation of the General Agreement as a whole." *See Dolphin Report*, *supra* note 18, para. 5.25.

finding with the long history of ETMs for which Article XX(b) was designed.[224]

For example, in 1908 Australia banned the importation of matches containing white phosphorus.[225] In 1912 the United States banned the importation of matches made from white phosphorus and levied a high tax on their domestic manufacture.[226] These laws were passed as part of an international effort to suppress this manufacturing method because it caused a gruesome occupational disease.[227] Did the drafters of the GATT mean to disallow such import bans? Undoubtedly, the bans violate Article XI. Since the method of regulation at the border (an import ban) differs from the method of domestic regulation (a tax), the U.S. import ban does not fit the criteria of Article III. The import ban might be justified under Article XX if the GATT could protect foreign health. But following the reasoning of the Dolphin Panel, a ban on the importation of phosphorus matches would be GATT-illegal since the ban would have no "jurisdictional" purpose.[228]

Since the phosphorus match import ban was apparently not perceived by the U.S. government to be GATT-illegal at the time the GATT was being written,[229] there is only one way this import interdiction could have been GATT-consistent: coverage under the Article XX exceptions. This casts further doubt on the finding by the

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224. *See* Charnovitz, *supra* note 11, at 38-43.

225. Proclamation of 19 Dec. 1908, GAZETTE, at 1707.

226. White Phosphorus Matches Act, ch. 75, 37 Stat. 81-84 (1912) (repealed in 1976).

227. In 1906, a multilateral treaty had banned the production and importation of these matches. *See* 203 C.T.S. 13, v. 203, 35. For various reasons, Constitutional and political, the United States chose not to ratify the treaty.

228. There were two rationales for the import ban: First, to cooperate with other nations that were trying to extirpate this production method. Second, to assure that domestic producers (who were giving up white phosphorus rather than be taxed) would not be put at a competitive disadvantage vis-à-vis foreign producers (who might continue to use the phosphorus method because it was less expensive). *See* TAXING WHITE PHOSPHORUS MATCHES, H.R. DOC. NO. 406, 62d Cong. 2d Sess., at 1-5 (1912). It would seem unlikely that the Dolphin Panel would endorse the second rationale even though it is unequivocally domestic.

229. Although there is no explicit evidence that the U.S. Department of State concluded that the match import ban was GATT-legal, the Department did not include this import ban in its list of laws that were inconsistent with Article XI or in the list of pre-1947 mandatory laws qualifying under GATT's grandfather clause. *See* U.S. Laws Inconsistent with the ITO Charter (on file at trade library of U.S. Department of State).

Dolphin Panel that the authors of GATT meant to exclude "extrajurisdictional" measures from Article XX's scope.

It is interesting to note that only one pre-GATT treaty specifically limited the health exception to "domestic animals or plants."[230] Otherwise, it seems clear that the typical environmental exceptions in treaties were meant to embrace foreign animals, since many treaties provided an exception for "measures taken to preserve them from degeneration or *extinction*."[231] In hypothesizing that this policy was abandoned in drafting the GATT, one would have to assume that the countries chose to jettison the numerous laws and treaties in existence at the time[232] which protected extrajurisdictional resources. Yet there is no evidence that such a decision was made.

One can also see the fallacy of the Dolphin decision when one considers another GATT general exception: the provision "relating to the products of prison labour" in Article XX(e).[233] Although the panel did not address a prison labor process restriction, some of the same reasoning suggesting that Article XX(b) cannot be "extrajurisdictional" applies to Article XX(e) too.[234] It seems doubtful that anyone, even the Dolphin Panel, would argue that Article XX(e) applies only to products of domestic convict labor. But if not, on what basis can Article XX(e) be read as having a broader geographical reach than XX(b)?[235]

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230. Treaty of Amity and Commerce, Feb. 12, 1930, P.R.C.-Czech., 110 L.N.T.S. 285, 290, art. XIII.

231. *See, e.g.,* Protocol for the International Convention for the Abolition of Import and Export Prohibitions and Restrictions, 1929, art. 4, 97 L.N.T.S. 393, 46 Stat. 2489, 2490 (emphasis added). Presenting this treaty to the Senate, President Coolidge pointed out that existing import restrictions were covered by these exceptions. *See* Message from the President of the United States, Jan. 3, 1929, *in* Senate Executive T, 70th Cong., at 4.

232. *See generally* Charnovitz, *supra* note 11.

233. Since 1890, the United States has banned the importation of products made by convict labor. The current prohibition dates back to 1930. *See* 19 U.S.C. § 1307 (1988).

234. For a discussion of the GATT exception concerning prison labor, see Steve Charnovitz, *The Influence of International Labour Standards on the World Trading Regime,* 26 INT'L LAB. REV. 565, 570-71 (1987).

235. While the existence of Article XX(e) buttresses the argument that Article XX can be applied extrajurisdictionally, it weakens the argument that Article III can apply to the production process. In other words, why would any country banning domestic trade in prison-made goods have asked for Article XX(e) if it could apply the same rule to imports under Article III:4? At the time GATT was written, the United States had a law criminalizing the importation of or interstate commerce in prison-made goods. *See* 18 U.S.C. § 1761 (1988 and Supp. 1992). Yet, the United States included Article XX(e) in its draft of the International Trade Organization. Of course, Article XX(e) was based on similar

Assuming that the Dolphin decision is not adopted and Article XX continues to be viewed as having international scope, many problems will still arise in adjudication. During the past few years, some nations have expressed an interest in banning the importation of products whose sale or production is prohibited in the country of export (dangerous pesticides, for example).[236] It is often suggested that such a ban might violate the softer MFN prerequisite in Article XX because like imports would still be allowed from countries that have no domestic ban.[237] But it would seem that such an import ban would meet the "same conditions" clause in Article XX. After all, an American food and drug law of 1938 that banned the importation of domestically prohibited goods[238] was not viewed by the United States, at the time the GATT was written, as being GATT-inconsistent.[239]

In summary, environmental import bans violate Article XI. Whether they are nevertheless legal under Article XX depends on whether they meet the specific prerequisites in the headnote to Article XX and in subsections (b) and (g). Recent GATT panels have eroded subsections (b) and (g) in defiance of the drafting history of the

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provisions in previous U.S. trade agreements. *See, e.g.,* 49 Stat. 3808, 3811 (1935). The United States began its ban on prison-made imports in 1890, but did not ban such interstate commerce until 1935. *See* 26 Stat. 567, 624 (1890). Thus, this prison labor exception originated at a time when the United States had different rules for foreign and domestic commerce of prison-made goods.

236. *See generally* Craig D. Galli, *Hazardous Exports to the Third World: The Need to Abolish the Double Standard*, 12 COLUM. J. ENVTL. L. 71, 74 (1987). For example, Mexico prohibits the importation of products banned in the country of manufacture or preparation. *See* U.S. Government, REVIEW OF U.S.-MEXICO ENVIRONMENTAL ISSUES, Feb. 1992, at 27. The rationale for such bans becomes clearer when one recalls that some countries, such as the United States, routinely exempt exports from laws which ban the use of certain products. Thus, developing countries cannot assume that exports from the United States are safe simply because they are from the United States.

237. *See, e.g.,* Robert A. Reinstein, *Trade and Environment*, U.S. Dep't of State, May 6, 1991, at 7. In addition to the problem of GATT legality, banning imports *only* from countries that impose domestic prohibitions would create perverse disincentives for environmental protection.

238. Domestically prohibited goods are those goods whose sale is prohibited within the country of origin. Federal Food, Drug, and Cosmetic Act, ch. 675, § 801, 52 Stat. 1040, 1058 (1938) (current version codified at 21 U.S.C. § 381(a) (Supp. 1992)). An earlier law had banned the importation of food or drugs of a kind forbidden entry into the country from which it is made or exported. *See* 34 Stat. 772 § 11 (1906) (repealed). The law of 1938 has not been challenged in the GATT.

239. *See* U.S. Laws Inconsistent with the ITO Charter (on file at trade library of U.S. Dep't of State).

GATT.[240] The exclusion of so-called extrajurisdictional ETMs from Article XX(b) and (g), suggested in the unadopted Dolphin Report, is also unjustified by the drafting history.[241]

IV. EXPORT BANS

There is a long history of using export bans to conserve domestic resources.[242] For example, the United States first banned log exports from its territories in 1878.[243] Similarly, the United States conditions the exportation of natural gas from Alaska on a finding that such exports will not decrease energy availability or increase prices.[244] Export bans are also used to protect foreign life and health.[245] For example, in 1905, the United States prohibited the exportation of "any article or thing designed or intended for the prevention of conception, or procuring of abortion."[246]

One of the earliest international environmental agreements, the African Convention of 1900, called for a system of export licenses for specimens like giraffes and zebras.[247] Although this convention had minimal effect on wildlife protection, it was important in establishing the principle of using export controls to preserve natural resources of interest to more than one country. There are now several treaties which rely on export restrictions to safeguard global resources. For example, the Montreal Protocol has three export restrictions aimed at nonparties. First, parties are prohibited from

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240. As one commentator notes, "The panel resorted to a strained reading of the GATT's legislative history . . . . The end result was to render the Article XX exceptions virtually meaningless." *See* Stephen J. Porter, *The Tuna/Dolphin Controversy: Can the GATT Become Environment-Friendly?*, 5 GEO. INT'L ENVTL. L. REV. 91, 102-04 (1992).

241. It is interesting to note that Article 36 of the EEC Treaty (which is similar to Article XX of the GATT) is extrajurisdictional. *See* Ludwig Krämer, *Environmental Protection and Article 30 EEC Treaty*, 30 COMMON MKT. L. REV. 111, 117-20, 139-40, 143 (1993).

242. In sixth-century Athens, Solon banned the export of produce (other than olive oil) to maintain sufficient domestic supply of food. *See* NEW ENCYCLOPÆDIA BRITANNICA, Vol. 10, 1991, at 951.

243. 20 Stat. 46 (1878) (current version codified at 16 U.S.C. § 602 (Supp. 1993)).

244. 15 U.S.C. § 719(j) (Supp. 1993).

245. An underlying motivation, however, may be commercial—that is, to maintain a reputation for product quality and salubriousness. *See, e.g.,* 50 App. § 2401(10) (1991).

246. 33 Stat. 705 (1905) (current version codified at 18 U.S.C. § 1462(c) (1988)).

247. Convention for the Preservation of Wild Animals, Birds and Fish in Africa, 1900, art. II, 10, at 188 C.T.S. 418 (not in force).

exporting CFCs to nonparties.[248] Second, parties agree to discourage the export of technology to nonparties for producing or utilizing CFCs.[249] Third, parties must refrain from providing new subsidies, aid, credits, guarantees or insurance to nonparties that would facilitate the production of CFCs.[250]

Some export bans are tied to whether a recipient country approves the export (*contingent exports*) while others are tied to whether the export will be safely used (*consumption practices*). Contingent export controls have been used since at least 1906 when the United States prohibited the exportation of any dangerous food or drugs unless the product was prepared according to the specifications of a foreign purchaser and was not in conflict with the laws of the destination country.[251] For a more modern example, the U.S. Hazardous and Solid Waste Amendments Act of 1984 bans the export of hazardous waste to another country without the consent of that country's government.[252]

Contingent export provisions are becoming increasingly common in environmental agreements. For example, under CITES parties may not export endangered species unless an import permit has been granted for the specimen.[253] Also, under the Basel Convention, parties may not export hazardous wastes unless the importing nation consents in writing.[254]

The other type of export ban, consumption practice restrictions, have a long history for purposes such as national security,

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248. Montreal Protocol, *supra* note 194, arts. 3(c), 4:2, 26 I.L.M. at 1554-55. The export restrictions on CFCs are designed to preserve not CFCs, but rather the ozone layer. Exports may be permitted to nonparties who are determined to be in compliance with the treaty. *Id.*

249. *Id*. arts. 4:5, 4:7, 26 I.L.M. at 1555.

250. *Id*. arts. 4:6, 4:7, 26 I.L.M. at 1555. For the U.S. implementation of this provision and the technology export ban in the United States, see 42 U.S.C. § 7671m(c)(1) (Supp. 1992).

251. Pure Food Act § 2, 34 Stat. 768 (1906) (repealed but replaced by similar legislation codified at 21 U.S.C. § 381(e)(1) (1993)). Although it may seem irrational to deem a substance too dangerous for one's own citizens but safe enough to be sold to foreigners, offering such an exemption for exports may be politically important to attaining domestic safeguards.

252. 42 U.S.C. § 6928(d)(6) (1988).

253. CITES, *supra* note 10, art. II:2(b), 12 I.L.M. at 245.

254. Basel Convention, *supra* note 197, art. 4:1(c), 28 I.L.M. at 661. In 1988, the EPA banned the export of hazardous substances from the United States unless the receiving country consents in writing. *See* 40 C.F.R. § 262.52 (1992).

nuclear nonproliferation, and narcotics control,[255] but they are increasingly being used for environmental stewardship. For instance, under CITES, parties may not export specimens to be used for primarily commercial purposes.[256] Under the Basel Convention, parties must prohibit exports to nations that do not have the technical capacity "to dispose of the wastes in question in an environmentally sound and efficient manner."[257] New Zealand prohibits the exportation of certain animals unless the applicant agrees to take part in a coordinated breeding program for the species.[258] Australia prohibits the export of live native animals except to zoos or for scientific research.[259]

Export bans violate GATT Article XI.[260] Article III cannot bypass Article XI for exports as it may for imports. But if a country has an internal regulation prohibiting the production of something, there would be nothing to export. It is interesting to note that when the U.S. Congress enacted a ban in 1990 on the exportation of unprocessed timber originating from federal and certain state public lands, the law suggested that this action was justified under one of the exceptions to Article XI.[261] In recognition of the tenuousness of this claim, however, the Congress also enacted an escape valve authorizing the President to terminate the ban upon an unfavorable

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255. For example in 1922, a U.S. law banned the export of certain narcotic drugs to countries which had not ratified the Opium Convention of 1912. *See* 38 Stat. 275, 597-98 (1914) (repealed but replaced by similar legislation codified at 21 U.S.C. § 953(a)(1) (1988)).

256. Parties may not export unless an import permit has been granted. *See* CITES, *supra* note 10, art. III:2(d), 12 I.L.M. at 246. But an import permit should not be granted if the species is to be used primarily for commercial purposes. *Id.* art. III:3(c).

257. Basel Convention, *supra* note 197, art. 4:8-9, 28 I.L.M. at 663.

258. Letter from Ian Govey, Dep't of Conservation, New Zealand, to Steve Charnovitz (not dated) (on file with author).

259. Wildlife Protection (Regulation of Exports and Imports) Act, 1982, § 21(b) and 28(c). As with the U.S. Endangered Species Act, this law is more protective than CITES in several respects.

260. Export taxes are a different matter. So long as they are imposed on a nondiscriminatory basis and do not contradict tariff bindings under Article II, export taxes—even at a prohibitive level—would not violate the GATT. *See* JOHN M. JACKSON, WORLD TRADE AND THE LAW OF GATT 44 (1969). Of course, the United States cannot use export taxes because the Constitution prohibits them. U.S. CONST. art. I, § 9, cl. 5.

261. Forest Resources Conservation and Shortage Relief Act of 1990, Pub. L. No. 101-382, tit. IV, §§ 488, 491, 104 Stat. 714, 719 (1990) (current version at 16 U.S.C. §§ 620, 620c (Supp. 1992)). Only the export of *unprocessed* timber is banned, leading some observers to conclude that the goal was not to maintain wood resources in the United States but rather to maintain wood processing plants in the United States.

ruling by a GATT (or other trade agreement) panel.[262] No country has challenged this ban so far.

It is generally agreed that Article XX sections (b) and (g) allow a nation to control exports for the purpose of safeguarding its domestic environment. Yet, in line with the GATT principle of market access, Article XX(g) permits export regulations only if they are done "in conjunction with restrictions on domestic production or consumption." This rule would prevent a nation, for instance, from refusing to sell its raw timber to foreigners while continuing to chop down its trees. If a nation does impose domestic restrictions, then it is allowed to impose analogous restrictions on exports. It is interesting to note that some pre-GATT bilateral treaties had allowed an exception for export controls "to retain possession of such resources as are indispensable to maintain the food supply and to safeguard the economic life of the nation."[263]

The Dolphin decision casts doubt on whether Article XX sections (b) and (g) could justify export controls aimed at protecting a nondomestic environment.[264] For example, the controls on hazardous waste exports under the Basel Convention may violate the GATT.[265] On the other hand, the export controls mandated by the Montreal Protocol are probably on firmer GATT ground since the ozone layer does have implications for domestic life and health.

Contingent export restrictions may be inconsistent with Article XX's proscription against "arbitrary or unjustifiable discrimination between countries where the same conditions prevail." While it may be argued that how a product is used or whether the other country consents could be one of the "conditions" under Article XX, this matter has never been adjudicated. As noted above with respect to contingent import prohibitions, it is unlikely that any

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262. 16 U.S.C. § 620c (Supp. 1992). The President is not required to terminate the ban. Yet if he wants to, he need not await the GATT Council's adoption of the panel report. *Id.*

263. *See, e.g.,* Commercial Convention between Switzerland and the Turkish Republic, May 4, 1927, art. 4, 67 L.N.T.S. 143, 145.

264. *Dolphin Report, supra* note 18, paras. 5.26, 5.31, 30 I.L.M. at 1620-21. *See also* Eckard Rehbinder, "Environmental Protection and the Law of International Trade," *in* THE FUTURE OF THE INTERNATIONAL LAW OF THE ENVIRONMENT 365-66 (1985).

265. For a good discussion of the GATT status of the Montreal Protocol and the Basel Convention, see Betsy Baker, *Protection, Not Protectionism: Multilateral Environmental Agreements and the GATT*, 26 VAND. J. TRANSNAT'L L. 437 (1993).

GATT member would complain. Moreover, if a dispute were to arise under the Basel Convention, the complaint might be resolved using the dispute settlement procedures of the Convention rather than the GATT.[266]

In summary, environmental export bans violate Article XI. Whether they are nevertheless permissible under Article XX depends on whether they meet the specific prerequisites in the headnote and in subsections (b) and (g). Recent GATT panels have interpreted subsections (b) and (g) in restrictive ways unjustified by the drafting history of the GATT. Making exports to a country contingent on the approval of that country may be a technical violation of the GATT, but this practice is unlikely to instigate any GATT complaints.

V. POLICY IMPLICATIONS AND CONCLUSIONS

The four sections above address the question of how GATT rules can hinder national ETMs. These sections considered four main types of ETM (product standards, process standards, import bans, and export bans) and laid out the factors that would be considered in determining their GATT-legality. Although many ETMs could survive GATT challenge, many others would run into problems with GATT Articles I, III, and XI. This was true even before the Dolphin decision. But since the decision, many ETMs, especially those concerned with the global commons or a foreign environment, are under suspicion of being GATT-illegal. (See Table II for a summary of the main points regarding GATT legality.)

Table II

GATT STATUS OF ENVIRONMENTAL TRADE MEASURES		
TYPE	**EXAMPLE**	**GATT STATUS**
PRODUCT STANDARD	Biodegradable detergent	Meets Article III.
PROCESS STANDARD-Defiled Item	Mackerel caught out of season	Probably meets Article III.
PROCESS STANDARD-Government Policy	Leg-hold traps	Fails Article III. Article XX status unclear.
IMPORT PROHIBITION-Simple	Wild animals	Fails Article XI. Meets Article XX.
IMPORT PROHIBITION-		Fails Article XI.

266. *See* Basel Convention, *supra* note 197, art. 20. The procedures call for submission of the dispute to the International Court of Justice or to arbitration if the parties so agree.

Contingent Import	Endangered species	Meets Article XX.
IMPORTANT PROHIBITION-National Attribute	African elephant ivory	Fails Articles I and XI. Probably fails Article XX.
EXPORT PROHIBITION-Simple	Logs	Fails Article XI. Meets Article XX.
EXPORT PROHIBITION-Contingent Export	Food and drugs	Fails Article XI. Meets Article XX.
EXPORT PROHIBITION-Consumption Practice	Waste disposal	Fails Article XI. Article XX status unclear.

According to the Dolphin Panel, the adoption of its report would not affect:

> the rights of individual contracting parties to pursue their internal environmental policies and to co-operate with one another in harmonizing such policies.[267]

This statement may be true as far as it goes. Yet, nations that engage in international trade cannot limit themselves to "internal" environmental policies. If an environmental policy is to be effective, it often must be applied to goods from other countries. Moreover, many environmental issues are global and can only be dealt with through "extrajurisdictional" governmental actions. Even before any members of the Dolphin Panel were born, governments were banning imports of endangered species. But the panel seemed to ignore this history. In addition, the panel does not admit the implications of its report for the rights of individual parties to pursue environmental policies.

The Dolphin Panel also may be correct that the GATT would not interfere when governments cooperate with one another in harmonizing their environmental policies. But GATT problems will arise when countries are unrequited in their quest for international coordination. In other words, ETMs are often brought into use when other countries choose not to engage in environmental cooperation. For example, CITES applies its rules to trade with nonparties. The Montreal Protocol and the Basel Convention also apply ETMs to nonparties, and do so in a discriminatory way. A ban on trade with nonparties is at fundamental odds with GATT's most-favored-nation principle.

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267. *Dolphin Report*, *supra* note 18, para. 6.4.

The authors of GATT sought to promote world trade by forbidding discrimination, requiring national treatment, prohibiting import and export bans, and locking in lower tariff rates through trade negotiations. The authors recognized that certain national policies had to remain outside of these rules, and therefore provided the "General Exceptions." The provisions in Article XX(b) and (g) do not use the term "environment," but these two exceptions are broad enough to embrace virtually all environmental issues.

The language in Article XX(b) seems especially elegant: it exempts measures necessary to protect human, animal or plant life or health. By emphasizing "life," Article XX goes beyond the goal of biodiversity or the collective choice made by an international organization like CITES of what merits being added to the endangered list. Article XX allows each country to decide what life it wants to preserve.

When one considers Article XX(b) and (g), in conjunction with the deference to internal regulations in Article III, a good case can be made that the GATT has green roots. This is not to say that the GATT actively fosters environmental protection or cooperation; surely it does not. But the GATT's authors recognized that promoting freer trade did not require dismantling health and conservation measures. The GATT's authors also understood that some matters needed to remain in the hands of national governments.

A respect for health and conservation and a recognition that certain decisions cannot easily be internationalized lies at the core of many of the current proposals for "greening the GATT." Yet, to a large degree, environmental sovereignty is already provided for in Article XX. The GATT has run into problems with the environmental community not because it lacks green roots, but because the gardeners in Geneva have tried to eradicate the General Exceptions. In cropping away parts of Article XX, the Dolphin Panel was not doing anything that previous panels had not done.[268] But the previous panels did their pruning with little public attention. The Dolphin Panel was caught with shears in hand.

In arguing that the GATT should respect national environmental sovereignty, I do not mean to suggest that anything goes. The problem of protectionist measures disguised as health or

268. For a discussion of these panel reports, see Charnovitz, *supra* note 11, at 47-52.

environmental policy is a real one. The authors of the GATT sought to deal with it through the disciplines in the Article XX headnote. It is ironic that GATT has done little to use these disciplines to weed out disguised protectionism. Instead, the emphasis has been on attacking unilateralism and process ETMs.[269] The Uruguay Round prunes further by requiring some weighing of environmental benefits versus commercial cost.

Should nations be able to set the environmental standards they want? Yes, of course. Should countries establish supranational organizations to review and dictate changes in domestic laws when such laws impede international trade? Only to a limited extent. The aim should be to expose commercial measures disguised as environmental ones.[270] The GATT should not aim to harmonize national environmental policies or to prevent environmental extremism.[271]

Given the large number of import quotas, tariffs, and managed trade regimes throughout the world,[272] the GATT is not going to run out of honest work to do in the foreseeable future. Indeed, there are many barriers that are admitted to be protectionist and which involve a large amount of potential world trade. This being the case, one wonders why the GATT devotes so much energy to going after the ETMs that are not protectionist (such as the MMPA) and which, in any event, involve only a tiny amount of trade.

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269. For example, see the lengthy report on "Trade and the Environment" issued by the GATT Secretariat in 1992 in INTERNATIONAL TRADE 90-91, Vol. 1, at 19-47.

270. As one commentator notes, "[w]here the commodity in question is one concerning which powerful national groups desire protection in the home market, the temptation is often irresistible to obtain such protection under guise of protecting the home consumer against perils to health." *See* Wallace McClure, WORLD PROSPERITY (1933), at 461.

271. Notwithstanding their sovereignty, it would still be good if countries were to develop some international guidelines on the use of such measures. One problem with production process and government policy standards is that two countries might impose conflicting standards on the same subject. For example, if Country A prohibited imports of products made in a country using nuclear power, and Country B prohibited imports of products made in a country using fossil fuel power, then Country Z would have a difficult time qualifying under both restrictions. This dilemma would not occur with a defiled item standard, since Country Z can vary its production process to meet the specifications of A and B.

272. A recent study found that the reduction in tariffs (but not quotas) contemplated in the Uruguay Round would boost world income by $206 billion. *See* Ian Goldin et al., TRADE LIBERALISATION: GLOBAL ECONOMIC IMPLICATIONS (1993).

The GATT denies that its rules are anti-environment. But the emphasis it has placed on attacking ETMs has led many observers to suspect the worst about the GATT. One commentator goes so far as to say that the GATT "is currently the greatest obstacle to the formation and enforcement of international agreements and domestic policies aimed at protecting the global environment."[273] Similarly, before he joined the Clinton Administration, Bruce Babbitt, now Secretary of the Interior, wrote that

> the task for the next administration will be to extend the linkage between trade and the environment to the entire world trading system. GATT, the world trading organization, remains dead set against such change and it will take a few sticks of dynamite to blow that organization into the 21st century.[274]

Additionally, before he ran for Vice President, Senator Al Gore wrote that "[i]t will also be increasingly important to incorporate standards of environmental responsibility in the laws and treaties dealing with international trade."[275] During the past year, the battle for NAFTA has engendered a real grass roots movement of citizens who are deeply suspicious of trade agreements.[276] Given the high level of interest and concern, the issue of GATT and the environment is not going to fade away as it did twenty years ago.

Many analysts suggest that the GATT prohibits distinctions based on the production process, and that this is desirable both to thwart protectionism and to dissuade countries from trying to "impose" their views on other countries. Other analysts share the view that the GATT prohibits such distinctions, but consider this stance a prime example of why the trading system needs reform. This article presents a third position, namely, that the GATT *already*

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273. K. Gwen Beacham, *International Trade and the Environment: Implications of the General Agreement on Tariffs and Trade for the Future of Environmental Protection Efforts*, 3 COLOM. J. INT'L ENVTL. L. & POL'Y 655, 681 (1992).

274. Bruce Babbitt, *Next Step for Environmentalists: Redeeming 'Lost Opportunity' of This Year's Rio Summit*, ROLL CALL, Sept. 28, 1992, at 34.

275. AL GORE, EARTH IN THE BALANCE 343 (1992).

276. *See, e.g.,* RALPH NADER ET AL., THE CASE AGAINST FREE TRADE (1993). The theme song of the anti-GATT campaign was "Drop the GATT." The lyrics include: "Afraid you ain't eating enough pesticides?/ GATT's gonna take you on a chemical ride/ You say your country's got high standards?/ That don't mean nothin' when you deal with these bandits."

permits distinctions based on the production process for environmental purposes under Article XX (if not Article III). If so, then major reform is unnecessary.

Over the past decade, the "high priests" of trade at the GATT have sought to snip away GATT's green roots by reinterpreting the canons of Article XX and by writing new doctrine to restrict environmental measures. Many environmentalists today would like to carry a revolution to the international trading system.[277] They seek to rewrite GATT Articles I, III, XI, and XX. But that is not the wisest course. What the GATT and its high priests need is a reformation.

277. For proposals to amend GATT to facilitate sustainable development, see Charles Arden-Clark, *International Trade, GATT, and the Environment*, WWF, May 1992.